



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>

CN
EAM
BA

THE
AMERICAN AND ENGLISH
RAILROAD CASES.

A COLLECTION OF ALL THE
RAILROAD CASES IN THE COURTS OF LAST RESORT IN
AMERICA AND ENGLAND.

J. C. THOMSON, Editor.
WM. M. McKINNEY, Associate Editor.

VOLUME XXXVII.



NORTHPORT, LONG ISLAND, N. Y.:
EDWARD THOMPSON COMPANY, PUBLISHERS.

1889.



H1366
COPYRIGHT, 1889,

BY EDWARD THOMPSON CO.

TABLE OF CASES REPORTED.

	PAGE		PAGE
Able, Dallas & Greenville R. Co.		Chicago, Burlington & Quincy R.	
<i>v</i>	453	Co., State of Iowa <i>v</i>	721
Anthony, Dillingham <i>v</i>	1	Chicago & Eastern Illinois R. Co.	
Artusy <i>v</i> Missouri Pac. R. Co.	288	<i>v</i> Hedges	516
Atlantic & Pac. R. Co. <i>v</i> Lesueur.	368	Chicago & Grand Trunk R. Co.,	
Bailey <i>v</i> Hartford & Connecticut		Thomas <i>v</i>	108
Valley R. Co	483	Chicago, Milwaukee & St. Paul R.	
Baldwin <i>v</i> Grand Trunk R. Co.	126	Co. <i>v</i> Harper	549
Barker <i>v</i> Hannibal & St. Joseph		Chicago, Milwaukee & St. Paul R.	
R. Co.	292	Co., Iltis <i>v</i>	299
Bate <i>v</i> Canadian Pac. R. Co.	208	Chicago & Northwestern R. Co.,	
Bell <i>v</i> Norfolk & Southern R.		Stutz <i>v</i>	187
Co	270	Chicago, St. Louis & Pacific R.	
Bills, Chicago, St. Louis & Pacific		Co. <i>v</i> Bills	121
R. Co. <i>v</i>	121	Chicago, St. Paul, Minneapolis &	
Birmingham St. R. Co., Ricketts		Omaha R. Co., State <i>ex rel</i> R.	
<i>v</i>	12	& Warehouse Commission <i>v</i>	602
Boston & Bangor S. S. Co., Dodge		Chollette <i>v</i> Omaha & Republican	
<i>v</i>	67	Valley R. Co	16
Boston & Maine R. Co., Dewire		Christian County, Louisville &	
<i>v</i>	57	Nashville R. Co. <i>v</i>	400
Boston & Maine R. Co., Fox <i>v</i>	632	Cincinnati, Wabash & Michigan	
Bowers, Pennsylvania R. Co. <i>v</i>	353	R. Co., Lake Shore & Michigan	
Briggs <i>v</i> Union St. R. Co	204	Southern R. Co. <i>v</i>	430
Brooks <i>v</i> Lincoln St. R. Co	560	City of Decatur, Illinois Cent. R.	
Brown <i>v</i> Eastern & Midlands R.		Co. <i>v</i>	395
Co	558	Close <i>v</i> Lake Shore & Michigan	
Buffalo East Side R. Co. <i>v</i> Buffalo		Southern R. Co	522
St. R. Co.	200	Commonwealth, Delaware & Hud-	
Buffalo St. R. Co., Buffalo East		son Canal Co. <i>v</i>	359
Side R. Co. <i>v</i>	200	Commonwealth <i>ex rel</i> Marion	
Canada Atlantic R. Co., Shoebrink		County <i>v</i> Louisville & Northern	
<i>v</i>	462	R. Co	418
Canadian Pac. R. Co., Bate <i>v</i>	208	Conolly <i>v</i> Crescent City R. Co	117
Canadian Pac. R. Co., Casey <i>v</i>	172	Cooper, New York, Philadelphia	
Casey <i>v</i> Canadian Pac. R. Co	172	& Norfolk R. Co. <i>v</i>	33
Central R. & B. Co. <i>v</i> Cheatham.	282	Cooperstown & Susquehanna Val-	
Central R. Co. <i>v</i> Raiford	481	ley R. Co., Hunter <i>v</i>	74
Central Stock Yard & Transit Co.,		County of Christian, Louisville &	
Delaware, Lackawanna & Wes-		Nashville R. Co. <i>v</i>	400
tern R. Co. <i>v</i>	607	County of Hopkins, Louisville &	
Charman <i>v</i> Southeastern R. Co.	495	Nashville R. Co. <i>v</i>	400
Cheatham, Central R. & B. Co. <i>v</i>	282	County of Marion, Commonwealth	
Chesapeake, Ohio & Southwestern		<i>ex rel v</i> Louisville & Northern	
R. Co., Green & Barren Rivers		R. Co	418
Nav. Co. <i>v</i>	238	County of Martin <i>v</i> Drake	389
Chicago & Alton R. Co. <i>v</i> Lam-		County of Murray <i>v</i> Minnesota	
kin	413	Loan & Ins. Co.	389

	PAGE		PAGE
County of San Benito <i>v.</i> Southern Pac. R. Co	374	Grand Trunk R. Co. of Canada, International Express Co. <i>v.</i>	622
Crescent City R. Co., Conolly <i>v.</i>	117	Green & Barren Rivers Nav. Co. <i>v.</i> Chesapeake, Ohio & Southwestern R. Co	238
Crosnoe, St. Louis, Arkansas & Texas R. Co. <i>v.</i>	313	Grummond, Laffrey <i>v.</i>	235
Crumpley <i>v.</i> Hannibal & St. Joseph R. Co	357	Gulf, Colorado & Santa Fe R. Co. <i>v.</i> Walker	342
Dallas & Greenville R. Co. <i>v.</i> Able	453	Hannibal & St. Joseph R. Co., Barker <i>v.</i>	292
Decatur, City of, Illinois Cent. R. Co. <i>v.</i>	395	Hannibal & St. Joseph R. Co., Crumpley <i>v.</i>	357
Delaware Bay & Cape May R. Co. <i>v.</i> Markley	421	Hannibal & St. Joseph R. Co., State <i>ex rel.</i> Tillery <i>v.</i>	406
Delaware & Hudson Canal Co. <i>v.</i> Commonwealth.	359	Hanson <i>v.</i> Flint & Pere Marquette R. Co	628
Delaware, Lackawanna & Western R. Co. <i>v.</i> Central Stock Yard & Transit Co	607	Harper, Chicago, Milwaukee & St. Paul R. Co. <i>v.</i>	549
Delaware, Lackawanna & Western R. Co., Maxson <i>v.</i>	162	Hartford & Connecticut Valley R. Co., Bailey <i>v.</i>	483
Denver & Rio Grande R. Co., Price <i>v.</i>	626	Hartwell <i>v.</i> Northern Pac. Express Co	635
Dewire <i>v.</i> Boston & Maine R. Co.	57	Haynes, Missouri Pac. R. Co. <i>v.</i>	645
Dillingham <i>v.</i> Anthony	1	Heany <i>v.</i> Long Island R. Co.	529
Doane, New York, Chicago & St. Louis R. Co. <i>v.</i>	87	Hedges, Chicago & Eastern Illinois R. Co. <i>v.</i>	516
Dodge <i>v.</i> Boston and Bangor S. S. Co	67	Hills <i>v.</i> Richmond & Danville R. Co	44
Dougherty <i>v.</i> Missouri Pac. R. Co	206	Hoag <i>v.</i> New York Central & Hudson River R. Co	479
Drake, Martin County <i>v.</i>	389	Hopkins County, Louisville & Nashville R. Co. <i>v.</i>	400
Dry Dock, East Broadway & Battery R. Co., Mayor etc. of New York <i>v.</i>	411	Howard <i>v.</i> Kansas City, Fort Scott & Gulf R. Co	552
Duluth, South Shore & Atlantic R. Co., Freeman <i>v.</i>	501	Hunter <i>v.</i> Cooperstown & Susquehanna Valley R. Co.	74
Eastern & Midlands R. Co., Brown <i>v.</i>	558	Illinois Cent. R. Co. <i>v.</i> City of Decatur	395
Easton, Insurance Co. of North America <i>v.</i>	671	Iltis <i>v.</i> Chicago, Milwaukee & St. Paul R. Co	299
Emery <i>v.</i> Raleigh & Gaston R. Co	253	Inman <i>v.</i> South Carolina R. Co.	663
Evans, Missouri Pac. R. Co. <i>v.</i>	144	Insurance Co. of North America <i>v.</i> Easton	671
Farrell <i>v.</i> Richmond & Danville R. Co	704	International Express Co. <i>v.</i> Grand Trunk R. Co. of Canada	622
Fitchburg R. Co., Littlejohn <i>v.</i>	54	Iowa, State of <i>v.</i> Chicago, Burlington & Quincy R. Co.	721
Flint & Pere Marquette R. Co., Hanson <i>v.</i>	628	Irvine, Norfolk & Western R. Co. <i>v.</i>	227
Fox <i>v.</i> Boston & Maine R. Co	632	Ivey, Missouri Pac. R. Co. <i>v.</i>	46
Freeman <i>v.</i> Duluth, South Shore & Atlantic R. Co	501	Johnson, Missouri Pac. R. Co. <i>v.</i>	128
Galveston, Harrisburg & San Antonio R. Co. <i>v.</i> Kutac	470	Kanawha & Ohio R. Co., Searle <i>v.</i>	179
Galveston, Harrisburg & San Antonio R. Co. <i>v.</i> Porfert	540	Kansas City, Fort Scott & Gulf R. Co., Howard <i>v.</i>	552
Georgia R. Co., Peavy <i>v.</i>	114	Kansas City, Springfield & Memphis R. Co., Williams <i>v.</i>	329
Godfrey <i>v.</i> Ohio & Mississippi R. Co	8	Kansas Pac. R. Co. <i>v.</i> Whipple	320
Grand Trunk R. Co., Baldwin <i>v.</i>	126	Kelley <i>v.</i> Manhattan R. Co	60
		Kitley, Pittsburgh, Cincinnati & St. Louis R. Co. <i>v.</i>	511

TABLE OF CASES REPORTED.

V

	PAGE		PAGE
Knopf v. Richmond, Fredericks- burg & Potomac R. Co	140	Missouri Pac. R. Co. v. Haynes . . .	645
Kutac, Galveston, Harrisburg & San Antonio R. Co. v	470	Missouri Pac. R. Co. v. Ivey	46
Laffrey v. Grummond	235	Missouri Pac. R. Co. v. Johnson . .	128
Lake Shore & Michigan Southern R. Co. v. Cincinnati, Wabash & Michigan R. Co	430	Missouri Pac. R. Co. v. Shuford . .	194
Lake Shore & Michigan Southern R. Co., Close v	522	Missouri Pac. R. Co. v. Vande- venter	651
Lamkin, Chicago & Alton R. Co. v	413	Missouri Pacific R. Co., Wolfe v . .	715
Lapleine v. Morgan's Louisiana & Texas R. & S. Co	348	Missouri Pac. R. Co. v. Wortham . .	82
Lesueur, Atlantic & Pac. R. Co. v .	368	Morgan's Louisiana & Texas R. & S. Co., Lapleine v	348
Lincoln St. R. Co., Brooks v . . .	560	Murray County v. Minnesota Loan & Ins. Co	389
Little, Western R. Co. of Alaba- ma v	659	New York Central & Hudson River R. Co., Hoag v	479
Littlejohn v. Fitchburg R. Co . .	54	New York Central & Hudson River R. Co., Palmer v	533
Liverpool & Great Western Steam Co. v. Phenix Insurance Co . . .	681	New York, Chicago & St. Louis R. Co. v. Doane	87
Long Island R. Co., Heany v . . .	529	New York, Mayor etc. of v. Dry Dock, East Broadway & Battery R. Co	411
Louisville & Nashville R. Co. v. Christian County	400	New York, New Haven & Hart- ford R. Co., Town of West- brook v	446
Louisville & Nashville R. Co. v. Hopkins County	400	New York, Philadelphia & Nor- folk R. Co. v. Cooper	33
Louisville, New Albany & Chica- go R. Co. v. Snider	137	Norfolk & Southern R. Co., Bell v .	270
Louisville & Northern R. Co., Commonwealth v	418	Norfolk & Western R. Co. v. Ir- vine	227
Lyon, Pittsburgh, Cincinnati & St. Louis R. Co. v	231	Northern Pac. Express Co., Hart- well v	635
McCleneghan v. Omaha & Re- publican Valley R. Co	245	Northern Pac. R. Co. v. Raymond .	379
Mackie, St. Louis, Arkansas & Texas R. Co. v	94	Ohio & Mississippi R. Co., God- frey v	8
MacKinney, Pennsylvania R. Co. v	153	Omaha & Republican Valley R. Co., Chollette v	16
McWhorter v. Pensacola & At- lantic R. Co	566	Omaha & Republican Valley R. Co., McCleneghan v	245
Manhattan R. Co., Kelley v . . .	60	Palmer v. New York Central & Hudson River R. Co	533
Marion County, Commonwealth ex rel. v. Louisville & Northern R. Co	418	Palmer v. Pennsylvania R. Co . . .	150
Markley, Delaware Bay & Cape May R. Co. v	421	Peavy v. Georgia R. Co	114
Martin County v. Drake	389	Pennsylvania R. Co. v. Bowers . .	353
Maxson v. Delaware, Lackawanna & Western R. Co	162	Pennsylvania R. Co. v. MacKinney .	153
Mayor etc. of New York v. Dry Dock, East Broadway & Battery R. Co	411	Pennsylvania R. Co., Palmer v . .	150
Memphis & Charleston R. Co. v. Womack	308	Pensacola & Atlantic R. Co., Mc- Whorter v	566
Minnesota Loan & Ins. Co., Mur- ray County v	389	Pensacola & Atlantic R. Co. v. State (six cases)	579
Missouri Pac. R. Co., Artusy v . .	288	Phenix Insurance Co., Liverpool & Great Western Steam Co. v . .	681
Missouri Pac. R. Co., Dougherty v .	206	Pittsburgh, Cincinnati & St. Louis R. Co. v. Kitley	511
Missouri Pac. R. Co. v. Evans . .	144	Pittsburgh, Cincinnati & St. Louis R. Co. v. Lyon	231
		Pontiac, Oxford and Port Austin R. Co., Ten Eyck v	273
		Porfert, Galveston, Harrisburg & San Antonio R. Co. v	540

	PAGE		PAGE
Price <i>v.</i> Denver & Rio Grande R. Co.	626	State of Iowa <i>v.</i> Chicago, Burlington & Quincy R. Co.	721
Quinn <i>v.</i> South Carolina R. Co.	166	Stockwell, Terre Haute & Indianapolis R. Co. <i>v.</i>	278
Raiford, Central R. Co. <i>v.</i>	481	Stutz <i>v.</i> Chicago & Northwestern R. Co.	187
Railroad & Warehouse Commission, State <i>ex rel.</i> <i>v.</i> Chicago, St. Paul, Minneapolis & Omaha R. Co.	602	Ten Eyck <i>v.</i> Pontiac, Oxford & Port Austin R. Co.	273
Raleigh & Gaston R. Co., Emery <i>v.</i>	253	Terre Haute & Indianapolis R. Co. <i>v.</i> Stockwell	278
Raleigh & Gaston R. Co., Washington <i>v.</i>	25	Thomas <i>v.</i> Chicago & Grand Trunk R. Co.	108
Ratliffe, Sibley <i>v.</i>	295	Thomas, Yazoo & Mississippi Valley R. Co. <i>v.</i>	392
Raymond, Northern Pac. R. Co. <i>v.</i>	379	Tillery, State <i>ex rel.</i> <i>v.</i> Hannibal & St. Joseph R. Co.	406
Rhoads, South Florida R. Co. <i>v.</i>	100	Town of Westbrook <i>v.</i> New York, New Haven & Hartford R. Co.	446
Richmond & Danville R. Co., Farrell <i>v.</i>	704	Twist <i>v.</i> Winona & St. Peter R. Co.	336
Richmond & Danville R. Co., Hills <i>v.</i>	44	Union St. R. Co., Briggs <i>v.</i>	204
Richmond, Fredericksburg & Potomac R. Co., Knopf <i>v.</i>	140	Vandeventer, Missouri Pacific R. Co. <i>v.</i>	651
Ricketts <i>v.</i> Birmingham St. R. Co.	12	Walker, Gulf, Colorado & Santa Fe R. Co. <i>v.</i>	342
St. Louis, Arkansas & Texas R. Co. <i>v.</i> Crosnoe	313	Wallace <i>v.</i> Western North Carolina R. Co.	159
St. Louis, Arkansas & Texas R. Co. <i>v.</i> Mackie	94	Washington <i>v.</i> Raleigh & Gaston R. Co.	25
San Benito County <i>v.</i> Southern Pacific R. Co.	374	Westbrook, Town of <i>v.</i> New York, New Haven & Hartford R. Co.	446
Searle <i>v.</i> Kanawha & Ohio R. Co.	179	Western R. Co. of Alabama <i>v.</i> Little	659
Shoebrink <i>v.</i> Canada Atlantic R. Co.	462	Western & Atlantic R. Co. <i>v.</i> Young	489
Shuford, Missouri Pac. R. Co. <i>v.</i>	194	Western North Carolina R. Co., Wallace <i>v.</i>	159
Sibley <i>v.</i> Ratliffe	295	Whipple, Kansas Pac. R. Co. <i>v.</i>	320
Snider, Louisville, New Albany & Chicago R. Co. <i>v.</i>	137	Williams <i>v.</i> Kansas City, Springfield & Memphis R. Co.	329
South Carolina R. Co., Inman <i>v.</i>	663	Winona & St. Peter R. Co., Twist <i>v.</i>	336
South Carolina R. Co., Quinn <i>v.</i>	166	Wolfe <i>v.</i> Missouri Pacific R. Co.	715
South Florida R. Co. <i>v.</i> Rhoads	100	Womack, Memphis & Charleston R. Co. <i>v.</i>	308
Southeastern R. Co., Charman <i>v.</i>	495	Wortham, Missouri Pac. R. Co. <i>v.</i>	82
Southern Pac. R. Co., San Benito County <i>v.</i>	374	Yazoo & Mississippi Valley R. Co. <i>v.</i> Thomas	392
State, Pensacola & Atlantic R. Co. <i>v.</i> (six cases)	579	Young, Western & Atlantic R. Co. <i>v.</i>	489
State <i>ex rel.</i> R. & Warehouse Commission <i>v.</i> Chicago, St. Paul, Minneapolis & Omaha R. Co.	602		
State <i>ex rel.</i> Tillery <i>v.</i> Hannibal & St. Joseph R. Co.	406		

DILLINGHAM

v.

ANTHONY.

(*Texas Supreme Court, February 15, 1889.*)

Receivers—Liability to Suit—Leave of Court.—Under the Act of Congress of March 3, 1887, receivers appointed by the courts of the United States are subject to suit, without leave, in any court having jurisdiction over the subject-matter.

Malicious Assault—Evidence—Harmless Error.—In an action to recover damages for a malicious assault committed by a conductor upon a passenger, the court admitted testimony to the effect that the conductor had stated that "this" (referring to his punch) was what he "had done" the plaintiff up with. Upon objection being taken, the court directed the jury not to consider this testimony. *Held*, that any error in admitting such testimony was cured by the instruction to disregard it.

Same—Liability of Company.—A railroad company is liable for a malicious assault committed by the conductor of a train upon a passenger, although such assault was not made in the course of the conductor's duty, it being the duty of the company to protect its passengers against insult and outrage.

Same—Punitive Damages—Ratification.—In Texas, the court will not hold a railroad company liable for punitive damages for the act of a servant committed maliciously and in no way connected with the fulfilment of his duties, there being no ground upon which a ratification of such act can be founded.

Same—Ratification—Retention in Service.—Under the rule adopted by the Texas courts, a company is not liable in punitive damages for an assault committed wantonly and maliciously by a conductor, although such company may have retained the conductor in its employment thereafter.

ERROR to District Court, Freestone County.

Action to recover damages, actual and exemplary, for injuries resulting from an assault and battery upon the plaintiff by the conductor in charge of the train upon which he was travelling. The defendant brings error to review a verdict and judgment for the plaintiff.

O. T. Holt, for plaintiffs in error.

O. C. Kirven, B. H. Gardner, and Hume & Kleberg, for defendant in error.

STAYTON, C. J. This action was brought by defendant in error,
37 A. & E. R. R. Cas.—1.

July 28, 1887, against plaintiffs in error, who were receivers appointed by a circuit court of the United States prior to the time the injury complained of was inflicted, and in possession of and operating the Houston and Texas Central Railway at the time plaintiff claims to have been injured. It was brought to recover damages, actual and exemplary, on account of injuries resulting from an assault and battery made on him, while a passenger in one of the cars, by the conductor in charge of the train and in the employment of the receivers. There was a verdict and judgment in favor of defendant in error for \$1,000 as actual, and \$2,000 as exemplary, damages.

Plaintiff in error, by plea, denied the jurisdiction of the court below, on the ground that no court other than the one appointing them could exercise jurisdiction. This was overruled, and correctly so, for, whatever may be the true rule in suits brought against the receivers, as to the necessity for leave to sue them in other courts, under the Act of Congress, of March 3, 1887, receivers appointed by the courts of the United States are subject to suit, without leave, in any court having jurisdiction over the subject-matter. No court can interfere with the custody of property held by another court through a receiver, but may establish by its judgment a debt against the receivership, which must be recognized even by the court appointing the receiver, and not open to review by it, if the court rendering the judgment had jurisdiction of the subject-matter and the parties. The manner in which a judgment so rendered shall be paid, and the adjustment of equities between all persons having claims on the property and effects in the hands of a receiver made, must necessarily be under the control of the court having custody through its receiver; but this does not affect the jurisdiction of other courts conclusively to establish by judgment the existence and extent of a claim.

On the trial the conductor testified, as a witness, and, on being interrogated, stated that he did not tell A. W. Williams on the night after the difficulty, holding his ticket-punch in his hand:

"This is the thing I did the son of a bitch up with;" and afterwards Williams was permitted to state that the witness at time and place mentioned did make such a statement to him. The evidence was objected to on the ground that the declarations of the conductor, made subsequently to the difficulty, were not admissible against the defendants. After the evidence was admitted, the court withdrew it from the consideration of the jury, and instructed them not to consider it; but it is insisted that the judgment should be reversed because of its admission. It is frequently the case that evidence is admitted which, on reflection, the trial court deems it proper to withdraw from the consideration

of the jury, and in some cases such action ought to be held to cure the error, while in other cases the evidence might be of such character, and the whole case so presented, as to induce the belief that the jury may have been influenced by the erroneous admission of evidence, although subsequently told by the court to disregard it. In the latter case the admission of evidence that ought to have been excluded might be ground for reversal, and in the former, not. The evidence of the witness Williams was not admissible for the purpose of proving that the conductor did strike the plaintiff with his ticket-punch; but it may have been relevant to the issue as to how the battery was made, and, for the purpose of impeaching the evidence of the conductor to show that he had made statements out of court different from those made in court, admissible. If, however, the evidence was not admissible for any purpose, we do not perceive that it was calculated to operate to the injury of the defendants. From the testimony given by the conductor on the trial, and from the testimony of McCartney and the plaintiff, there could be but little doubt that the conductor did use his ticket-punch in the battery, and the language shown to have been used by him at the time of the difficulty showed as fully his *animus* at that time as possibly could the language testified to by the witness Williams.

It is urged that the court erred in charging that defendants would be liable if the acts of the conductor were wilful and malicious. There is no doubt that ordinarily the master is not liable for an injury resulting from the wilful and malicious acts of his agent, not done in the course of his employment. This is the rule in all cases in which the liability of the master depends on the sole fact that the person who inflicted the injury was in some business his servant; and if, upon enquiry, it be found that the act was not done while in the transaction of the master's business, then the act is not to be deemed the act of the master, for as to that the wrong-doer was not his servant. The rule, however, cannot be applied in a case in which the master, by contract express or implied, is under obligation to protect the injured person from the servant's wrongful act as well as his own. When a duty is thus imposed on the master, the servant employed to discharge it is the representative of the master, for whose acts, whether of omission or commission, resulting in injury to the person entitled to have the duty performed, the master must be held as fully responsible, and liable to make, at least, actual compensation, as though the act were his own personal act. In such cases, if the servant does what the master could not do, nor suffer to be done, without violation of the particular duty resting upon him; or if the servant omits to do that which is requisite to the full discharge of the master's incumbent duty,—then the master must be held

Liability for
servant's
malicious
act.

responsible for the servant's wrongful or malicious act or omission; for otherwise it would result that a master might relieve himself from obligation to perform a duty fixed by contract or otherwise by the employment of servants to conduct the business to which the duty attaches. The master's obligation cannot thus be avoided, and whether the servant's act violative of the master's duty be wilful or malicious is a matter of no importance in determining the liability and obligation of the master to make actual compensation of the injured person. It has been steadily held to be the duty of a carrier of passengers to protect them, in so far as this can be done by the exercise of a high degree of care, from the violence and insults of other passengers and strangers, and to protect them from the violence and insults of the carrier's own servants; and the enquiry whether this duty arises from contract or from the nature of the employment becomes unimportant, except that the duty goes with the carrier's contract, however made, whereby the relation of carrier and passenger is established. *Ramsden v. Boston & A. R. Co.*, 104 Mass. 120; *Bryant v. Rich*, 106 Mass. 180; *Craker v. Chicago & N. W. R. Co.*, 36 Wis. 657; *Stewart v. Brooklyn & C. R. Co.*, 90 N. Y. 588; *Sherley v. Billings*, 8 Bush 147; *Chicago & E. R. Co. v. Flexman*, 103 Ill. 546; *Wabash, St. L. & P. R. Co. v. Rector*, 104 Ill. 296; *Goddard v. Grand Trunk R. of Can.*, 57 Me. 202. Under the facts of this case the court below properly held that the defendants, as receivers, were liable for injuries resulting from the wilful or malicious acts of the conductor.

On the question of exemplary damages the court instructed the jury as follows: "You are instructed that, to authorize a recovery of exemplary damages against the employer or master on account of an injury inflicted by an employe or servant, the wrongful act from which the injury resulted must be done by the servant or employe maliciously, and under such circumstances as would also authorize the recovery of actual damages from the employer or master; and, further, the act must be ratified by him. If the employer or master have a knowledge of the act and its character, and still continues the employe or servant in his former position, such retention is a ratification of the act of the servant or employe." The last paragraph of the charge quoted was repeated in a subsequent charge. In those jurisdictions in which it is held that exemplary damages may be given against a corporation for injuries wilfully or maliciously inflicted by its servants in all cases in which the wilful or malicious act was done in the course of the business entrusted to the servant, whether the act be authorized or ratified by the corporation, the giving of the charge complained of would probably be deemed harmless if the acts complained of in this case can be said to have been in the line of the conductor's duties.

In this state, however, that rule has not been adopted. In *Hays v. Houston & G. N. R. Co.*, 46 Tex. 284, which was a case in which the act complained of might properly have been held to have been done in the course of the employment of the servant, it was said: "If the malicious act of the agent is ratified or adopted; if there is carelessness in the selection of employes or in the establishment of regulations; if, in short, the corporation or its officers by whom it is controlled are guilty of some fraud, malice, gross negligence, or oppression,—the settled rules of law will hold it liable to exemplary damages, but, in our opinion, not otherwise." This ruling was followed in *Galveston, H. etc. R. Co. v. Donahoe*, 56 Tex. 162.

We have no disposition to reopen the question, in view of the conflict of authority, and, following these decisions, the remaining enquiry on this branch of the case is: Was the charge as to liability of appellants resulting from their ratification of the acts of the conductor called for by the facts of the case, or correct as a legal proposition in any case? It appears that appellee, as a passenger, entered a car on the road controlled by appellants, and that, having stopped on the platform outside of the car, he was informed by the conductor that this was a dangerous place, and requested to enter the car. As to whether this request was made by the conductor without insult and in proper manner the evidence is conflicting, as is it as to whether the conductor used force in removing appellee from the platform to the inside of the car. Be this as it may, it does appear that blows passed between the conductor and appellee immediately after the latter entered the car, and his evidence, as well as that of the conductor, tends most strongly to show that in this rencounter appellee was the aggressor, and the conductor acting in his own defense. They were then separated without any considerable injury to appellee, and we do not understand him to base this action on what occurred in the difficulty to which we have referred. After that ended, the conductor went on in the discharge of his ordinary duties, and appellee took his seat among the other passengers, but, after a short time had elapsed, the conductor returned to the car in which appellee was, and then committed an assault and battery upon him, which, at the time, was unprovoked, and made solely to avenge the insult or wrong the conductor conceived had been done him in what he claimed was an unprovoked assault, made upon him by the appellee in the former difficulty. The assault and battery then committed, and the injuries resulting therefrom, are made the basis of this action; and there is not the slightest ground for holding that it was committed in behalf of appellants, for their benefit, in their interest, or in the doing of any act necessary or proper to be done in the discharge of the duties imposed

on the conductor. On the contrary, the act complained of is shown to have been the wilful and malicious act of the conductor, in violation of his duty to his employers, and to the service, as well as to the passenger. Appellants, as carriers, are liable to appellee for actual damages, because there was a failure on their part, through the conductor or some other representative, to give that protection to the passenger which they, as carriers of passengers were bound to give; and this liability does not depend on whether the servant's failure of duty was unintentional, wilful, or malicious; but to make them liable for exemplary damages, if they stand on the same ground as other carriers, the wilful or malicious act of their servant must have become, in law, their wilful or malicious act. The rule in reference to affecting the master with the wilfulness or malice of a servant must be the same whether the master be a corporation, a receiver in charge of the business and property of a corporation or an individual. If, in performing any duty within the line of his employment, the servant uses unnecessary force in doing an act lawful within itself, and thereby he commits a trespass or crime, then the act may be deemed one for which the master is civilly responsible; but if the act be in itself illegal, however performed, or by whomsoever done, then the master ought not to be held liable, unless he advised, or in some way participated in, the unlawful act.

The court below charged that the act of the servant, with all of the servant's wilfulness and malice, would be imputed to appellants, if, with knowledge of his misconduct, they kept him in their employment; and so, without reference to whether the act was within the line of the conductor's duties, or one illegal in itself,—without reference to the manner of its execution. If there were no other ground on which appellants could be held liable for actual damages resulting from the injuries received by appellee from the battery made upon him by the conductor than that they had ratified his act, could their liability be fixed on that ground, however clear their subsequent approval of his act might be made to appear? “In order to constitute one a wrong-doer by ratification the original act must have been done in his interest, or been intended to further some purpose of his own.” Cooley, Torts, 127; *Railway Co. v. Broom*, 6 Exch. 326; *Wilson v. Barker*, 4 Barn. & Adol. 614; *Wilson v. Tumman*, 6 Man. & G. 241; *Broom*, Leg. Max. 873; *Wood, Mast. & Serv.* 598; *Bird v. Brown*, 4 Exch. 798; *Sutherland v. Sutherland*, 69 Ill. 481; *Moak, Underh. Torts*, 38. In the case before us there can be no pretence that the act of the servant was done in the interest of appellants, under any pretence of authority from them, or to further any interest of themselves or the corporation whose business and property they were controlling; and there was no ground on which to base ratification,

**Ratification
of malicious
act—Retention
in service.**

which is but an agreement, express or implied, by one to be bound by the act of another performed for him.

If appellants could not be held to have ratified their servant's unauthorized, wilful and malicious act, not done in their interest or for their benefit in fact or pretence, it is not perceived on what ground they can be held to be affected by the *animus* with which the servant committed the act; and, unless they could be so affected, there is no legal ground for awarding against them exemplary damages. If the servant's act be one not authorized by the master, or one not done in the exercise of a power fairly arising from the character of his employment, but be an act done for the use or benefit of the master, then the master may doubtless ratify the act of the servant through which a tort was committed: and it may be that, in such case, the ratification of the master would fix upon him the bad motive which prompted the servant's act, and thus impose on the master a liability even for exemplary damages. It has been so held by courts that hold the master not liable for exemplary damages in all cases in which the servant is. *Bass v. Chicago & N. W. R. Co.*, 42 Wis. 654. Such may be the effect of the decisions in this state to which we have referred, though there are contrary holdings. *Sutherland v. Sutherland*, 69 Ill. 481. Such a question, however, is not before us. Relying, as appellee does, on the injury inflicted upon him by the conductor after he took a seat in the car, we are of the opinion, under the evidence, that he shows no case entitling him to exemplary damages, under the decisions heretofore made in this state, to which we have referred; and that a case is not shown in which the jury should have been charged that they might find appellants had ratified the act of the conductor. If, however, the case were different, and it appeared that the conductor's act was done in the course of his employment, giving to this every intendment arising from his position and the nature of his duties, even then, it seems to us, that it cannot be held as a matter of law that the mere retention of the conductor in the same position, after knowledge of his misconduct, operates a ratification of his wilful and malicious act, and thus fixes his evil motive on his employer. The whole doctrine of *ex post facto animus* as a basis for exemplary damages seems to us an anomaly. It goes further than to punish for evil motive, and condemns and punishes for evil afterthought imputed, which the court below informed the jury existed, as matter of law, if the conductor was retained in the service after knowledge of his misconduct. There are cases which hold that retention in service, under such circumstances, amounts to ratification of acts that may be ratified; but it seems to us that this is not necessarily true, and that, where ratification is an issue, this should be left to the jury or court trying the cause, under all the evidence, to be

Recovery of
exemplary
damages.

passed upon as any other fact in issue. The charge given assumed that the act of the conductor was such as might be ratified, and that the facts recited in the charge, as matter of law, amounted to ratification. We think this was error. This case does not call for it, and we are not now disposed to consider what bearing the retention of a servant, in a position he has abused, ought to have in determining the liability of the master for his past or subsequent acts.

It is urged that the actual damages awarded are excessive; but we think, in view of the facts, this is not true; but, for reasons manifest, now decline to discuss the facts bearing on that question. For the errors mentioned the judgment will be reversed and the cause remanded.

Leave to Sue Receivers.—See *Lyman v. Cent. Vermont R. Co.*, and note, 30 Am. & Eng. R. Cas. 210, 222; *Reed v. Richmond & A. R. Co.*, 33 Am. & Eng. R. Cas. 503.

Liability of Company for Receiver's Negligence, etc.—See *Godfrey v. Ohio & M. R. Co.*, and note, *post*, p. 8, note, 12.

GODFREY

v.

OHIO AND MISSISSIPPI R. CO.

(*Indiana Supreme Court, October 9, 1888.*)

Receiver—Mistake of Agent—Liability of Company.—If a ticket agent, in the employ of the receiver of a railroad company, by mistake, issues the wrong ticket to an intending traveller, the company is not, upon subsequently resuming control of the road, liable for the mistake of the receiver's agent.

Same—Bond of Indemnity.—A company having been ordered to be put in possession of its road, which had been in the hands of a receiver, the court directed that all claims against the receiver should be presented for adjudication within 60 days. The railway company, as required by the order of the court, executed a bond, binding itself to pay any debts or liabilities contracted by the receiver under the authority of the court. *Held*, that the company was not liable, under such bond for a claim against the receiver for damages arising through the receiver's agent having by mistake issued the wrong ticket to an intending traveller.

Passenger—Ticket—Mistake in Issuing—Ratification.—If an intending traveller receives a ticket other than that for which he asks and retains the same for a period of four months without complaint, he will be deemed to have ratified the contract contained in the ticket according to its terms and to have waived any claim which he might have had in consequence of the mistake.

APPEAL from Circuit Court, Jackson County.

Action against the Ohio & Mississippi R. Co. to recover dam-

ages for the wrongful ejectment of the plaintiff, Harvey W. Godfrey, from one of defendant's trains. The plaintiff appeals from a verdict entered for defendant by direction of the court.

A. P. Charles and William K. Marshall, for appellant.

Jason B. Brown and R. Hill, for appellee.

MITCHELL, J. Godfrey sued the railroad company to recover damages alleged to have been suffered by him in being wrongfully ejected by the company's servants from one of its passenger trains upon which he had taken passage. **Case Stated.** The complaint is in two paragraphs, both of which are substantially alike, except that it is averred in the second paragraph that the railroad was being operated by a receiver at the time the plaintiff purchased the ticket upon which he claimed the right to be carried; and that although the railroad company was operating its road when the plaintiff presented the ticket, and claimed the right to ride upon it, the company had bound itself to carry out all contracts made by the receiver while the road was under his control. The court sustained a motion to strike out certain portions of the complaint, which set forth the particular facts and circumstances relating to the manner in which the plaintiff was put off the train. It is only necessary to say, in respect to the ruling on this motion, no error was committed. All the circumstances relevant to any injury sustained by the alleged wrong were admissible in evidence without being specially pleaded.

It appeared in evidence that on November 28, 1883, the plaintiff, intending to take passage from North Vernon to Charlestown, purchased a ticket at the North Vernon ticket office for the station last named. The agent by mistake delivered him a ticket which on its face purported to entitle the holder to one passage from "Charlestown to North Vernon." After taking his seat in the car, the plaintiff discovered the mistake; and, instead of offering the ticket to the conductor, paid his fare without mentioning the mistake, and was safely carried to his destination. When the plaintiff purchased his ticket, and continuously thereafter until April 1, 1884, the property and franchises of the railroad company were in the hands of a receiver, who operated the road under the order of the United States circuit court for the district of Indiana. On the date last above mentioned the company was put into possession of its property, and was authorized by the order of the court to take the management of its affairs, subject to such orders as the court might thereafter make, in the way of requiring the corporation to pay such claims or liabilities as the receiver may have incurred while in possession of the property. The order further required that all claims against the receiver should be presented to the court for adjudication.

Facts.

within 60 days. The railway company executed its bond, as required by the order of the court, binding itself to pay any and all debts or liabilities contracted by the receiver under the order of the court. On the 8th day of April, 1884, after the corporation assumed the operation of its road, the plaintiff went on board one of the company's regular passenger trains at North Vernon, which was proceeding on its way thence to Charlestown. He presented the ticket, purchased while the road was in the hands of the receiver, in November before. The conductor refused to receive the ticket, and demanded that the plaintiff should pay the usual fare; remarking, in the hearing of other passengers, that he did not know but that the ticket had been used before, or that the plaintiff might have stolen it. The plaintiff refusing to pay fare, the train was stopped at the next station, and the plaintiff directed to get off, which he did without resistance, and without suffering any violence to his person. There was other evidence, but the foregoing summary is all that is necessary to present the questions involved.

At the conclusion of the evidence the court instructed the jury to return a verdict for the defendant. This was done and judgment given accordingly. The propriety of the instruction of the court to the jury is the only question involved. The instruction was very clearly right upon two grounds, at least:

1. There was no evidence tending to show any mistake or negligence on the part of the railway company in the sale of the ticket.

The plaintiff purchased the ticket on which he insisted upon being carried of the receiver, more than four months before he attempted to use it. The mistake in delivering the wrong ticket was the mistake or negligence of the agent of the receiver. The railway company

could not be held responsible for injuries resulting from the omissions or mistakes of those who had possession and control of its property without its consent and in opposition to its will. It is settled beyond question that a railroad company, in the absence of a statute imposing liability, is not answerable for injuries resulting from the mistakes or negligence of a receiver or his agents while operating the road. *Ohio & M. R. Co. v. Davis*, 23 Ind. 553; *Bell v. Indianapolis, C. & L. R. Co.*, 53 Ind. 57; *State v. Wabash R. Co.*, 35 Am. & Eng. R. R. Cas., 1; High Rec. § 396. It is true the ticket, in a sense, was evidence of a contract, at least so far as to indicate that the holder thereof had paid his fare from Charlestown to North Vernon, but it was a contract made by the plaintiff with the receiver, and, in the absence of an express agreement to do so, the railway company was under no obligation to redeem tickets issued by the receiver while he was operating the road. The bond executed by the company to the

receiver was to indemnify the latter against all debts and liabilities incurred by him, but these were plainly such debts and liabilities as should be presented to the court within 60 days, and which the court should allow and order paid.

Bond of
Indemnity.

2. Over and above the considerations already mentioned, it is quite clear that the plaintiff had no right of action, and that the jury were properly directed to return a verdict for the defendant. As has been seen, the plaintiff purchased the ticket upon which he insisted he was entitled to ride, and **Mistake in** which had been delivered to him by mistake, more **issuing ticket** than four months before he presented it for use. He **-Ratification** discovered the mistake within a few minutes after re- **of Contract.** ceiving the ticket and taking his seat on the car. It is quite probable, if the plaintiff, without having ample opportunity to correct the mistake after discovering it, had offered the ticket on the first trip, and had been refused passage, he would have been entitled to recover for any injury, in case he had been ejected after having done all he reasonably could to rectify the mistake. The case would then have fallen within the principles declared in *Lake Erie & W. R. Co. v. Fix*, 88 Ind. 381, and cases of that class. But having retained the ticket, with full knowledge of its purport, without disclosing the mistake to any one connected with the management of the road, the plaintiff must be regarded as having ratified the contract according to its terms. Under section 2906, Rev. St. 1881, the plaintiff had the right to return the unused ticket and receive the money paid for it, or he had the option to retain it for what it purported to be, viz., a contract entitling him to be carried, without further payment of fare, from "Charlestown to North Vernon." A person may not deliberately enter upon a railroad train with knowledge that his ticket, on its face, entitles him to be carried in the reverse direction from that in which he proposes to go, and, with ample opportunity to procure another, insist upon being carried without paying fare. Railroad companies have the undoubted right to make reasonable regulations for the conduct of their business. It is certainly a reasonable requirement that a passenger, having the opportunity, should purchase his ticket to the place of his destination, and not in the opposite direction. To compel railroad companies to receive unused tickets, without regard to the direction which the holder wished to go, would introduce inextricable confusion into the business, and be of no benefit to any person possessed of sufficient intelligence to go upon a train. *Keeley v. Boston & M. R. Cas.* 67 Me. 163; *Bradshaw v. South Boston R. Co.* 135 Mass. 407; *Wakefield v. South Boston R. Co.*, 117 Mass. 544. The conclusion already arrived at renders it unimportant that we consider other questions discussed. The judgment is affirmed, with costs.

Liability of Company for Receiver's Acts.—The receiver of a railroad company is the representative of the court, and not of the company, and the company is not liable for his acts or those of his employees. Where evidence adduced showed that the injury occurred from the operation of a train on the defendant's road, and a presumption arose therefrom that the persons in charge of the train were its employees, the defendant may, if it has pleaded a general denial, show that the servants in charge of the train were not its servants, but those of the receiver operating the road under the decree of a court of competent jurisdiction. For the purpose of showing that at the time of the injury the road was being operated by a receiver, a decree, dated prior to the injury, which placed the property and management of the road in the hands of the receiver, ought to be admitted. But if, at the same time, a second decree, showing the time of the discharge of the receiver is tendered, neither it nor the decree appointing the receiver ought to be admitted, if it shows by its recitals that prior to the accident a former decree had been rendered in the case, which took the road from his hands and discharged him from the duty of operating the line. *Kansas & Gulf Short Line R. Co. v. Dorrough (Tex.)* 10 S. W. Rep. 711.

If a railroad is in the hands of a receiver, the company is not liable for injuries which are caused by the negligence of the receiver or his agents or servants. *Rogers v. Mobile & O. R. Co.*, 12 Am. & Eng. R. Co. 442; *Memphis & L. R. Co. v. Stringfellow*, 44 Ark. 323; s. c., 21 Am. & Eng. R. Co. 374; *Ohio & M. R. Co. v. Anderson*, 10 Ill. App. 313; *Ohio & M. R. Co. v. Davis*, 23 Ind. 553; *Bell v. Indianapolis, Cincinnati & L. R. Co.*, 53 Ind. 57; *Thurman v. Cherokee R. Co.*, 56 Ga. 376; *Metz v. Buffalo, C. & T. R. Co.*, 58 N. Y. 61; *Turner v. Hannibal & St. J. R. Co.*, 74 Mo. 602; *Dillingham v. Anthony*, *ante*, p. 1.

If, however, the company allows the tickets to be printed in its name and otherwise holds itself out to the public as operating the road, it will be liable for injuries occasioned to one who did not know of the receiver's appointment. *Washington, A. & G. R. Co. v. Brown*, 17 Wall. (U. S.) 445. And if the railroad company in constructing a culvert over a stream failed to provide for the free flow of such amount of water as might reasonably be anticipated to flow in a stream, it is liable for an injury caused by the insufficiency of the culvert even if, at the time of the injury, the management of the road has passed into the hands of a receiver. *Union Trust Co. of New York v. Cuppy*, 26 Kan. 754; s. c., 11 Am. & Eng. R. Cas. 562.

Where an absolute liability is fixed upon a railway by statute, as when the company is made by statute absolutely liable for the killing of stock in cases where its road is not securely fenced, the fact that the affairs of the company have passed into the hands of a receiver constitutes no defence to an action against the company. *Ohio & M. R. Co. v. Russell*, 115 Ill. 52; s. c., 23 Am. & Eng. R. Cas. 149, and note 153. The fact that a railroad is in the hands of a receiver is no defence to an action against the company under the Illinois Acts of 1874, to recover double the value of a fence built along the railroad track by an adjoining land owner on the failure of the company to build. *Ohio and M. R. Co. v. Russell*, 115 Ill. 52; s. c., 23 Am. & Eng. R. Cas. 149.

RICKETTS

v.

BIRMINGHAM STREET R. CO.

(Alabama Supreme Court, January 23, 1889.)

Franchise—Evidence of Transfer—Competency.—The transfer of a street railway company and its franchise cannot competently be proved by the testimony of a director that he has executed and has knowledge of the transfer of the same to another company.

Same—Evidence of Ownership—Declarations of President.—To render admissible declarations of the president of a street railway company as to the ownership of the lines formerly operated by the company, such declarations must have been made while he was in the performance of his duties as president, or while acting for the company, or while transacting any business contemporaneous with the declarations which they serve to explain.

Same—Unauthorized Transfer—Liability for Tort.—A street railway company cannot, without the authority of the legislature, transfer its property and franchises, and, notwithstanding an unauthorized transfer, it will remain liable for injuries to passengers upon the cars operated by the transferee.

Street Railway—Passenger—Alighting—Contributory Negligence.—It is contributory negligence for a passenger upon a street car to attempt to alight from same whilst in motion and whilst he is carrying a keg of lead weighing about 50 pounds.

APPEAL from Birmingham City Court.

Action against the Birmingham Street R. Co. by Wm. A. Ricketts, to recover damages for personal injuries. The plaintiff testified that while he was travelling upon a street car with a 50-pound keg of white lead, and was attempting to leave the car, the driver suddenly started it while he was still upon the front platform with the keg of lead in his arms, and that by the sudden motion he was thrown from the car upon the ground and injured. The defendant claimed that at the date of the accident the line was being operated by another company, the Birmingham & Pratt Mines Street R. Co., and a director of that company testified that at the time of the accident it was owner of and operating the railway. The witness also testified that he knew the fact from having seen the written contract of sale to the Pratt Mines R. Co., and from having been one of the parties thereto. On behalf of the plaintiff, a witness testified that the president of the Birmingham Street R. Co. had declared to him that at the time of the accident the latter company was the owner and manager of the railway, but that he expected shortly to turn over the railway to the Pratt Mines R. Co. The court gave the following charges at the request of the defendant:

“(1) If the jury believe from the evidence that the plaintiff was standing on the steps in front of the car with a keg of lead in his hands, when the car started forward; and that he, without necessity, undertook to step off to the ground while the car was in motion; and that such action on his part was not that of an ordinarily prudent man under like circumstances; and that he would not have been injured if he had remained on the steps,—then the defendant is entitled to a verdict, unless the jury further believe that the injury to the plaintiff was inflicted recklessly, wantonly, or intentionally. (2) In order to entitle the plaintiff to recover, the evidence must show that the defendant was operating the street railway at the time of the injury to the plaintiff. (3) If the jury believe from the evidence that the defendant was not operating the street railway upon which said injury to plaintiff

occurred, at the time of said injury, but that the same was operated by the Birmingham & Pratt Mines Railway Company, by its agents and servants, then the defendant is entitled to a verdict."

The plaintiff excepted thereto and appealed from a judgment for the defendant.

Garrett & Underwood for appellant.

Hewitt, Walker & Porter for respondent.

CLOPTON, J.—Appellant brings the action to recover for injuries suffered by being struck by a street car in which he had been transported as a passenger and which he was then leaving. The complaint avers that the defendant, being a corporation incorporated under the laws of Alabama, was the owner of the street railway over which the car was being run. The defendant does not dispute having at one time owned and operated the street railway, but seeks to avoid responsibility by alleging that about a month previous to the injury it sold the railway to another corporation, which was operating it at the time.

To establish this defence the defendant was allowed to prove by the witness, Thompson, that the Pratt Mines Company was at the time of the injury, March 4, 1887, the owner of and operating the street railway, and that he knew the fact from having seen the written contract of sale, to which he was a party, which sale was made February 4, 1887. The testimony of the witness goes beyond proof of the mere execution of the contract, to the extent that its effect was to transfer the ownership to the purchasing company, which involved the opinion of the witness as to the legal effect of the contract. *Shorter v. Sheppard*, 33 Ala. 648. The ownership of personal property, which may be transferred without writing, may be proved as a fact without producing the contract of sale, though in writing, when the question is incidental or collateral. But it is a familiar principle that parol evidence is inadmissible in reference to contracts required by law to be in writing. *Jonas v. Field*, 83 Ala. 445; *Lecroy v. Wiggins*, 31 Ala. 13. The title to realty can be transferred only by written instrument. Possession, accompanied by acts of ownership, may be proved and constitute *prima facie* evidence of title; but when the parol evidence extends beyond this, and it appears that the knowledge of the witness is derived from a written contract respecting real estate, such contract must be produced or its absence accounted for. *Patterson v. Kicker*, 72 Ala. 406; *Hussey v. Roquemore*, 27 Ala. 281; *Bell v. Denson*, 56 Ala. 444.

The declarations of Morris, the president of the defendant corporation, are not shown to have been made while he was in the

performance of his duties as such officer, or while acting for the company or while transacting any business contemporaneous with the declarations, which they serve to elucidate or explain. The declarations were not within the scope of his authority and are not binding on the defendant. *Lumber Co. v. Insurance Co.*, 77 Ala. 184; *Smith v. Plank Road Co.*, 30 Ala. 650.

**Evidence—
Declaration
of presi-
dent.**

The question as to the power of the corporation to alienate its rights to use the real and personal property necessary to accomplish the objects of its creation, and also its powers of control and supervision, so as to avoid responsibility for the manner in which the railway is managed and operated, arises on a charge requested by plaintiff, which is not shown to have been in writing as required by the statute. It has been repeatedly held that the judgment of the court below will not be reversed for a refusal to give a charge requested unless it affirmatively appears that it was asked in writing. The charge cannot be properly considered by us. The same observation applies to the other charges asked by plaintiff. *Winslow v. State*, 76 Ala. 42; *Wheless v. Rhodes*, 70 Ala. 419; *Crosby v. Hutchinson*, 53 Ala. 5.

There can be no question that the plaintiff was guilty of negligence, which proximately contributed to his injury, if he was standing on the steps in front of the car with a keg of lead in his hands when the car was started forward, and without necessity undertook, while the car was in motion, to step off on the ground, and would not have been injured if he had remained on the steps. Stepping from a moving car without necessity, when injury is caused thereby, which could have been avoided by remaining on the car—by the exercise of ordinary care—is negligence which will defeat a recovery, because of prior negligence of the agents or servants of the company. *Banking Co. v. Letcher*, 69 Ala. 106; *Thompson v. Duncan*, 76 Ala. 334. It is true that the bill of exceptions does not set forth any evidence from which the facts stated in the charge may be inferred, and, if there was no such evidence the charge is erroneous. But the bill of exceptions does not purport to set out all the evidence, and we must presume that there was sufficient on which to predicate the charge.

**Plaintiff
guilty of
contributory
negligence.**

Important franchises are conferred and duties imposed by the charter and general law, upon the defendant as a street railway corporation. From the performance of these duties it cannot absolve itself by a voluntary surrender, without legislative consent, of the whole of its property and franchises to another corporation. Notwithstanding such transfer may have been made, if it was without legislative authority, the defendant remained liable for injuries caused by the negligence of the ser-

**Transfer of
franchise—
Liability of
company.**

vants or employes of the transferee the same as though itself was operating the railway. *Washington A. & G. R. Co. v. Brown*, 17 Wall. 445. In such case both companies are responsible. In view of the evidence tending to show that the defendant had transferred the ownership and operation of the railway prior to the injury, it was not incumbent on plaintiff, in order to entitle him to recover, to show that the defendant was actually operating the road at the time of the injury. In this aspect of the case the proper enquiry relates to the legality and validity of the transfer. The charges which impose upon plaintiff the necessity to show that the railway was actually operated by the defendant at the time of the injury were calculated to mislead. 3 Wood Ry. Law, § 490.

Reversed and remanded.

Unauthorized Lease—Liability of Lessor.—If a railroad company leases the right to use its road without authority from the legislature, such lease will not absolve the lessor from its duties to the public and it will still remain liable for accidents upon the road whilst it is being operated by the lessee. *International & G. N. R. Co. v. Eckford (Tex.)*, 8 S. W. Rep. 679; *East Line & R. R. Co. v. Lee (Tex.)*, 9 S. W. Rep. 604.

See also *Braslin v. Somerville Horse R. Co.*, and note 145 Mass. 64; s. c., 32 Am. & Eng. R. Cas. 406; *International & G. N. R. Co. v. Underwood*, 34 Am. & Eng. R. Cas. 570; *Palmer v. Utah & N. R. Co.*, and note 36 Am. & Eng. R. Cas. 443, 445; *Chollette v. Omaha & R. V. R. Co.*, *infra*.

CHOLLETTE

v.

OMAHA AND REPUBLICAN VALLEY R. CO.

(*Nebraska Supreme Court, April 4, 1889.*)

Franchise—Unauthorized Transfer—Liability of Transferor.—A railroad company, organized and incorporated under the laws of Nebraska, cannot absolve itself from the performance of duties imposed upon it by law or relieve itself from liability for the wrongful acts or omissions of duty of persons operating its road, by transferring its corporate powers to them or permitting them to operate its road as owners of its capital stock. To allow it to do so would be contrary to the public policy of the state as expressed in its constitution and laws with reference to railroad companies.

Same—Statutory Authority.—The original obligation of a railroad company to the public cannot be discharged by a transfer of its franchises to another company, except by legislative enactment consenting to and authorizing such transfer, with an exemption granted to such company relieving it from liability. Legislative consent to the transfer is not alone sufficient; there must be a release from the obligations of the company to the public.

Passenger—Injuries—Connecting Carrier's Liability.—Plaintiff applied to an agent in the ticket office at the station at W, on defendant's road, for a ticket to

E, on the U. P. R. R., a number of miles east of the eastern terminus of defendant's road, which was on the line of the U. P. R. R., and by such agent was furnished a single local ticket from W to E. By direction of the agents in charge of the train she took her seat in the car, in which she was carried to the junction of the two roads and on to E without change. At E plaintiff was injured while alighting from the train, the injury being caused by the alleged negligence of those in charge of the train. *Held*, that in such case the defendant would be liable under the provisions of sec. 3, art. 1, c. 72, Comp. St., for the damages sustained.

ERROR to District Court, Saunders County:

Bell & Sornborger, for plaintiff in error.

J. M. Thurston, W. R. Kelly, J. S. Shropshire and W. W. Cotton, for defendant in error.

REESE, C. J.—This action was instituted in the district court of Saunders county, by plaintiff against defendant, and was for damages alleged to have resulted from a personal injury received by plaintiff while a passenger on defendant's road and in its cars, through the negligence of defendant's agents in starting the train before plaintiff could alight from the car at Elkhorn, and by which she was thrown violently down and seriously injured. If was alleged in the petition that defendant was a railroad corporation, duly organized and incorporated under the laws of the state of Nebraska and was on the date of the injury the owner of and operating a line of railroad as a common carrier of passengers, running from and through the city of Wahoo, in Saunders county, to and through the village of Elkhorn, in Douglas county; that on the 31st day of December, 1886, in consideration of the payment by plaintiff to defendant of the required fare for such service, the defendant received her as a passenger on its road, to be transported from Wahoo to Elkhorn; that, in consideration of the fare paid by plaintiff, defendant promised and undertook to transport her as aforesaid, and to furnish suitable means and allow sufficient time for her to enter and alight from its cars, but that by the negligence of defendant in failing and refusing to allow her sufficient time to alight from its cars at Elkhorn, and by negligently starting the car on which she was then riding before she had a reasonable time to alight therefrom, she was thrown down, and the injury received, to her damage, etc.

Statement
of case.

For answer defendant admitted that it was a railroad corporation, duly organized and incorporated under the laws of this state, but denied that it was at the date of the happening of the events described in plaintiff's petition, operating a line of road, as a common carrier, from Wahoo to Elkhorn, but alleged that it was the owner of a line of road from Valley, in the county of Douglas, to and through the city of Wahoo in Saunders county, and that the village of

Answer.

Elkhorn was not in or on any part of its line of road. For a second defence it was averred that defendant was a railroad corporation, organized as aforesaid, but denied that it was operating the road from Wahoo to Elkhorn, said last-named point being situated many miles eastward from the terminus of defendant's road, and upon the Union Pacific Railroad. It was further denied that defendant was operating its line of railroad and it was alleged that defendant's line of road was operated exclusively by the Union Pacific Railway Company, a corporation organized under and by virtue of the laws of the United States, and that said Union Pacific Railway Company was operating defendant's line of railroad by reason and because of its ownership of all the capital stock of defendant; and that by reason of such ownership the Union Pacific Railway Company, by its agents and servants, had the exclusive possession and control of all of the property of defendant, and was in exclusive possession and control of all the stations and trains operated upon and along the line of defendant's road; and that at the time mentioned in the petition defendant had no agent or servant in Saunders or Douglas county; and that if plaintiff purchased a ticket as alleged in her petition, such purchase was made of and obtained from the Union Pacific Railway Company and not from defendant, or any of its agents or servants. The third defence set up in the answer consisted of a denial of the reception of plaintiff by defendant as a passenger, the sale of a ticket to her, or receipt of fare, or that defendant was under any obligations to transport plaintiff. All carelessness or negligence on its part was also denied, as well as all injury to plaintiff. It was also alleged that if any such injuries were received or sustained they were received while plaintiff was a passenger upon the cars of the Union Pacific Railway, and not of defendant; and that any contract made for the purchase of a ticket from any person or agent at the time alleged was made with and purchased from the Union Pacific Railway Company which had charge of the train. It is also alleged that whatever injuries were received were by reason of the contributory negligence of plaintiff.

To this answer plaintiff filed her reply, admitting that the village of Elkhorn was not situated on the defendant's line of railroad, but was several miles eastward from its eastern terminus, on the line of the Union Pacific Railroad.

Plaintiff's The allegations of the answer concerning the use and
reply. occupation of defendant's road by Union Pacific Railway Company were denied, and it was alleged that the Union Pacific Railway Company had no power or authority to become the stockholder of defendant; and that it did not operate the line of road as alleged in the answer; and that the agents and servants referred to in the petition and answer were the agents and

servants of defendant. It was denied that plaintiff purchased her ticket from or made any contract for her transportation with, the Union Pacific Railway Company, but that she applied to the usual and well-known office of defendant, situated on its line of road and on its right of way, and that in response to such application to the persons in charge, she was sold a ticket for continuous passage from Wahoo to Elkhorn; that she boarded defendant's train at Wahoo and was carried through to Elkhorn without change of cars, where she received the injury through the negligence of defendant as alleged in her petition. All other allegations of the answer were denied. A jury was empanelled, when plaintiff called and examined certain witnesses tending to prove the purchase of a ticket at Wahoo in Saunders county and on the line of the defendant's road, to Elkhorn in Douglas county, on the line of the Union Pacific Railroad; that she went aboard the train at Wahoo and was transported without change of cars from there to Elkhorn, where the alleged injury occurred. Among other witnesses called was the station agent at Wahoo, who testified that he was the agent for the Union Pacific Railway Company, hired by the superintendent of the said company, who was also the superintendent of the Omaha & Republican Valley Railroad Company; that the Omaha & Republican Valley Railroad, upon the right of way of which the depot was located in which he was employed, was operated as a branch of the Union Pacific Railroad. That the ticket offered in evidence, and attached to the record was the character of ticket sold at the time plaintiff's ticket was purchased and was known as a local book ticket, which was used as a substitute for card tickets, commonly used on railway lines for local travel; that the reason why the ticket of the form given was used was that card tickets were used only between points where there was considerable travel; that between points where there was but little demand for tickets the local book ticket was used in its stead. This ticket was in the following form:

UNION PACIFIC RAILWAY.		LOCAL.	
One First Class Passage.			
Wahoo			
To Elkhorn _____			
Via _____			
When officially stamped.			
<p>If this ticket is sold at a reduced rate it is void after _____ 188. If no date is written hereon, conductors will honor this as an unlimited ticket. Baggage liability limited to wearing apparel, not exceeding \$100 in value.</p>			
<p>C. S. STEBBINS, General Ticket Agent.</p>			
1300 (Form L. 100)		1300	

Endorsed: "Union Pacific Railway, Dec. 31, 1886, Wahoo, Neb."

It was shown that all the freight and passenger business of the defendant was reported to the proper auditing officers of the Union

Evidence. Pacific Railway Company, who were also the auditing officers of the defendant; that the eastern terminus of the defendant's road was at Valley, on the Union Pacific Railroad, in Douglas county; and that the destination of plaintiff (Elkhorn) was on that road, a short distance east from Valley. It was also shown that no change of cars was made by passengers going from Wahoo to Elkhorn, but that the car in which the passengers were seated ran over the entire line between the two stations. Plaintiff then sought to prove that she had received the injury complained of at the station at Elkhorn, by the negligence of the persons in charge of the train, she being violently thrown from the car upon which she was riding, and from which she was endeavoring to alight, and by which she was injured, and offered to prove all the allegations of her petition in that behalf. To this offer defendant objected, as incompetent, irrelevant and immaterial, which objection was sustained and to which ruling plaintiff excepted. The court then directed the jury to return a verdict in favor of defendant, to which plaintiff also excepted. The verdict having been returned in accordance with the direction of the court, plaintiff presented her motion for a new trial, in which it was alleged that the court erred: "*First*. In directing the jury to find for the defendant. *Second*. In refusing to permit plaintiff to prove her case as made by her petition. *Third*. Error of law occurring at the trial. *Fourth*. The verdict is not sustained by sufficient evidence. *Fifth*. The verdict is contrary to law. *Sixth*. The court erred in giving the instructions Nos. 1 and 2 to the jury." This motion being overruled and judgment having been entered in favor of defendant on the verdict of the jury, the cause is brought to this court by plaintiff by proceedings in error.

Two questions are presented for decision: *First*, would the fact that the Union Pacific Railway Company was operating the defendant's road at the time of the accident, if such

Questions presented. were the fact, exempt defendant from the damages resulting from injuries of the kind alleged to have been sustained by plaintiff? And, *second*, if not, would the fact that the accident occurred on the line of the Union Pacific Railroad, and off the line of defendant's road, prevent a recovery against defendant, and render the Union Pacific Railroad Company alone liable, the contract for transportation having been made with defendant, the ticket delivered thereunder being a single local ticket (without coupons) for continuous passage, the transportation being continuous, upon the same train or car furnished by defendant at its station on the line of its own road?

We are unable to find any proof in the record as to the capacity in which the Pacific Railway Company had possession of the defendant's road, (if it had such possession,) whether of lessee, owner, or by a traffic arrangement. But for the purpose of this case we do not think it very material as to this, for we are of the opinion that no arrangement or contract could be made which would have the effect of releasing defendant from liability in a case of this kind. It is alleged in the petition, and admitted in the answer, and perhaps not denied in the reply, that the Union Pacific Railroad Company is a corporation organized under and by virtue of the laws of the United States, and hence is not a domestic corporation in the sense of being organized under the laws of this state. Section 3, c. 72, Comp. St., in treating of railroad corporations whose lines of road are in this state, is as follows: "Every railroad company as aforesaid, shall be liable for all damages inflicted upon the person of passengers while being transported over its road except in case where the injury done arises from the criminal negligence of the persons injured, or when the injury complained of shall be by the violation of some express rule or regulation of said road actually brought to his or her notice." Section 72, *et seq.*, c. 16, Comp. St., provides a method for the incorporation of railroad companies in this state, and confers upon such corporations the right of eminent domain and other privileges therein mentioned, among which are the right to lay out, locate, construct, furnish, maintain, operate and enjoy a railroad, and, for that purpose, the issuance of shares of capital stock of \$100 each, which shares shall be regarded as personal property and shall be subject to sale and transfer in the usual way, etc. The sale and transfer of the shares of stock would not necessarily confer upon another railroad corporation, the owner or holder of such shares, the right to take possession of the road, relieve it from its proper liability to its patrons, and compel them to look to the owner of the capital stock for their compensation for injuries received on its line. It is the general intent and purpose of the constitution and laws of this state that railroad companies, except such as have been chartered by congress, shall, as a condition precedent to the enjoyment of the proper rights and franchises of railroad companies, become organized and incorporated under the laws of this state and therefore subject to the jurisdiction of its courts. These provisions might be successfully evaded or rendered nugatory were corporations other than domestic corporations permitted to buy up the capital stock, assume exclusive control and management of the franchises conferred, and at the same time compel persons having legal demands to look to the non-resident corporation for their liquidation. It evidently never was the purpose of the legislature to permit corporations to be organized under

Transfer of
franchise—
Liability of
transferor.

the laws of the state, construct their lines of railroad, and then turn them over to foreign corporations for operation and management and thus avoid all legal liability growing out of a failure to discharge public duties. As is substantially said in many of the cases hereinafter cited, the right to organize corporations which shall have the right to exercise the sovereign powers conferred upon railroad companies is granted only by the laws of our state. A railroad corporation organizing under it does so with the liabilities of a domestic corporation attached. If a railroad company, to which the legislature has granted these franchises, permits others to use them, the original company must be responsible to the public for the negligence of such persons. It is only by authority derived from the law of this state that a railroad company can transfer to another the right to use its track, by lease or otherwise, and we know of no statute by which the original company can divest itself of responsibility by transferring its corporate powers to other parties, or by leasing its road to them. It is practically a universal rule in this country that the original incorporated company cannot, in the absence of special statute, authorizing an exemption, divest itself of responsibility for the torts of persons occupying its road by transferring its corporate powers or leasing the road to them. It cannot by its own act absolve itself from its proper obligations without the consent of the legislature. It is liable for injuries to its passengers caused by the negligence of another company which it allows to use its road. *Pierce*, R. R. 283, and cases there cited. See *Balsley v. Railroad Co.*, 119 Ill. 68; *Singleton v. Railroad Co.*, 70 Ga. 464; *Railroad Co. v. Brown*, 17 Wall. 445; *Railroad Co. v. Mayes*, 49 Ga. 355; *Nelson v. Railroad Co.*, 26 Vt. 717; *Railroad Co. v. Dunbar*, 20 Ill. 623. It follows that while the ticket might be issued in the name of the operating company, yet a liability would exist as against the corporation constructing and owning the road, even though the operating company might also be liable. In *Nelson v. Railroad Co.*, *supra*, Judge REDFIELD, in writing the opinion of the court, says: "The lessors must at all events be held responsible for just what they expected the lessees to do, and possibly for all which they do do, as their general agents; for the public can only look to that corporation to whom they have delegated this portion of public service. Certainly they are not bound to look beyond them, although they may doubtless do so."

It was shown by the evidence that plaintiff's husband went to the station on defendant's road and called for tickets to Elkhorn. Tickets similar to the one hereinbefore copied were handed to him by the agent. While the words "Union Pacific Railroad" are printed upon the ticket and also upon the stub attached thereto, yet there is nothing contained in the ticket which necessarily shows

Connecting
carrier's
liability.

it to be the contract of that company, or that the contract for carriage was made with it. A ticket is said to be a receipt taken, or voucher showing payment for the passage, rather than a contract, and by its purchase the contract between the passenger and the carrier is said to be consummated. The contract is implied by law except so far as it is expressed on the face of the ticket. 2 Wood Ry. Law 1394 and cases cited. The ticket, therefore, would not render the contract between plaintiff and defendant different from what it would have been had the words referred to not appeared on it. The contract having been to convey plaintiff to Elkhorn from Wahoo, as shown by the testimony above referred to, and a single ticket having been given, it would seem that plaintiff had the right to look to defendant for a fulfillment of such contract. While it is true that where coupon tickets are sold over long lines of connecting roads by the first company, acting alone as the agent of those over whose roads the passenger is to travel, the company selling the ticket is liable only for a safe passage over its line. Such connections do not exist here. For the purpose of the liability of defendant the whole line over which plaintiff was to pass was that of the defendant. In *Railway Co. v. Blake*, 7 Hurl. & N. 987, Chief Justice COCKBURN, in delivering the opinion of the court, says: "If a railroad company chooses to contract to carry passengers, not only over their own line, but also over the line of another company, either in whole or in part the company so contracting incurs all the liability which would attach to them if they contracted solely to carry over their own lines." In that case it was held that the defendant company was liable to the plaintiff for damage resulting from a personal injury caused by an accident on the line of the South Wales Railway Company, and over which the plaintiff was being transported in the same carriage which he entered at Paddington station, on the Great Western Railway Company's Line, and for which he had paid one fare for his conveyance to Milford, on the line of the South Wales Railway Company. The same was held in *Birkett v. Railway Co.*, 4 Hurl. & N. 729. See also *Buxton v. Railway Co.*, L. R., 3 Q. B. 549; *Thomas v. Railway Co.*, L. R., 6 Q. B. 266; *Stetler v. Railway Co.*, 49 Wis. 609; 6 N. W. Rep. 303; *Railroad Co. v. Peyton*, 106 Ill. 534; *Bissell v. Railroad Cos.*, 22 N. Y. 258; *Peters v. Rylands*, 20 Pa. St. 497. Our attention is called to *Hood v. Railroad Co.*, 22 Conn. 1, and it is insisted by defendant that the reasoning of Judge ELLSWORTH, in the opinion, conclusively establishes the rule adopted by the learned judge of the district court in his direction to the jury. In that case the plaintiff purchased a ticket from the defendant railway company to Collinsville. The defendant had no road to Collinsville, and passengers were conveyed from a point on its road to Collinsville by stage. A single ticket was sold, which was ex-

changed for a ticket given to plaintiff by the conductor on defendant's train, which is as follows: "New Haven and Northampton Company. Conductor's Ticket. New Haven to Collinsville, by stage from Farmington. O. D. Goodrich, Conductor." Judge ELLSWORTH, in his opinion, referring to the two companies (the railroad and stage companies,) says: "One company receives nothing for the services or expenditures or risks of the other; nor is there a participation in profits, nor a partnership nor joint obligation, nor joint control. Each attends exclusively to his own appropriate business,—the railroad company to the railroad, and the stage company to the stages."

It seems to us that the case at bar must be disposed of on principles differing materially from those applied to that case. While it is true that a single ticket was sold, yet it was known that only a portion of the passage could be made by rail; and, doubtless, as stated in the opinion of the learned judge, each company attended exclusively to its own appropriate business,—the railroad company to the railroad and the stage company to the stages. The railroad made no claim or pretension to carry passengers to Collinsville in its cars, and doubtless the same rule would have been applied had the stage company, instead of running coaches, furnished horses upon which the passengers might ride. But in this case the facts are entirely different. Plaintiff purchased her ticket to Elkhorn. Defendant placed her in a car for passage which was to, and did transport her to her destination without change. When she purchased her ticket, and boarded the car at Wahoo, the undertaking was clearly for her transportation therein to the point of destination. The fact that the car would pass over the track of another company *en route* could make no difference. The same may be said of the citations from 2 Ror. R. R. 997, and 2 Wood Ry. Law 1417, in which it is said, as we have before held, where coupon tickets are sold, the company selling the ticket is the agent of the connecting lines over which the coupons attached to the ticket will furnish the passenger transportation. We hold, therefore, that the agent by whom the ticket was sold to plaintiff, must be treated as the agent of defendant, and that by the sale of the ticket in response to a request for a ticket to Elkhorn, and a conveyance of plaintiff over the road in defendant's train and car, without change, procured by the single local ticket, the defendant would be liable for any injury to plaintiff while carrying her over the line designated in her ticket, caused by the negligence of those in charge of the train and car upon which she travelled. The judgment of the district court is therefore reversed, and the cause is remanded for further proceedings according to law. The other judges concur.

WASHINGTON

C.

RALEIGH AND GASTON R. CO.

(North Carolina Supreme Court, November 5, 1888.)

Passengers—Connecting Lines—Liability of Contracting Company.—Where there is a special contract to transport to a point beyond the contracting company's line, the companies whose services are required in the execution of the contract become *pro hac vice* agents of the contracting company in fulfilling the terms of the contract and giving it effect; and the contracting company is liable for personal injuries to a passenger caused by the negligence of such connecting company.

APPEAL from Superior Court, Wake County.

Action against Raleigh & Gaston R. Co. to recover damages for personal injuries sustained by the plaintiff, Gray Washington, whilst a passenger on a train belonging to the defendant, which was running on the track of a connecting line. The defendant appeals from a judgment entered upon a verdict for \$1,500 in favor of the plaintiff.

Batchelor & Devereux for appellant.

Armistead Jones for appellee.

SMITH, C. J.—On an application to an authorized agent of the defendant company by C. W. Hoover, in behalf and by authority of the members of a colored fire association known as the "Bucket and Ladder Company of the City of Raleigh," to engage an excursion train to run from said city to the town of Warrenton, and return, the following answer was received, bearing date May 25, 1887:

Facts.

"C. W. Hoover, Esq., Box 329, Raleigh, N. C.: DEAR SIR: In response to your favor of various, 1887, we will charter you three passenger coaches and one baggage car, to run by special train, to run between Raleigh and Warrenton, leaving Raleigh on the 13th day of June, 1887, returning leave Warrenton on the 13th day of June, 1887, for \$200 (two hundred dollars), to be paid, \$30 on or before May 25, 1887, and \$170 June 13, 1887, before departure of train from Raleigh. The conditions on which this charter is made are as follows: No greater number than sixty people are to go in any one car, nor will you be permitted to sell tickets at any point except Raleigh, said sales to be good only on your excursion; nor will you be permitted to sell any ticket on your return trip. Excursionists must return by same train or car in which

they are carried; otherwise full fare will be charged. If special train is run, the railroad company does not agree to adhere to any special schedule, unless notice is given when this contract is signed in time to enable proper schedule to be prepared; nor will this company be held responsible for the baggage of your passengers. Upon return of this letter with your signature accepting conditions as above, accompanied by \$30 forfeit (as a guaranty that you will carry out your part of this agreement), arrangements will be completed as noted.

"F. W. CLARK, General Passenger Agent.

"B."

"I accept the above conditions, and enclose \$30.

"C. W. HOOVER."

"If convenient to furnish additional coaches, charge will be \$26 each, to be paid before departure of train from Raleigh.

"F. W. C.

"B."

"Received the \$30 forfeit, as herein mentioned. F. W. C.

"B."

"May 25, 1887.

J. B. MARTIN, Auditor."

The defendant railroad does not run to Warrenton, but connects at one of its stations nearest to the town with an independent line known as the "Warrenton Railroad," which runs thereto over a track three miles in length. During the pendency of the negotiations for the excursion, and previous to the day of its departure a correspondence took place between the agents of these companies, which, and the result arrived at as seen therein, were as follows:

"RALEIGH, N. C., 5-11, '87.

"O. P. Shell, Warren Plains: We wish to contract for an excursion, Raleigh to Warrenton. Will the management of your road accept \$5 for engine and \$5 per coach for train passing over Warrenton Railroad from Warren Plains to Warrenton and return?

[Signed] F. W. CLARK."

"RALEIGH, 5-19, '87.

"O. P. Shell, Warren Plains: Please say to Mr. White that, if we can arrange Warrenton excursion, we will let engine go through.

[Signed] F. W. CLARK."

"WARREN PLAINS, N. C., May 19, 1887.

"To F. W. Clark: President of Warrenton road accepts your terms of \$5 per car, but directs me to say that our engine can haul only three passenger coaches at once, hence would like for you to send your engine through to Warrenton.

"[Signed] O. P. SHELL."

"RALEIGH, 5-24, '87.

"O. P. Shell, Warren Plains: Please see Mr. White and say to

him that we fear his rails are too light to take excursion train through with our engine. We are trying to arrange excursion to Warrenton from four to six coaches. Please wire me quick if the Warrenton engine can take such train at one haul. If not, how many can it take each trip, and what time will be consumed? Please wire me this information as soon as possible, and say if they will take these excursion coaches at \$5 each for round trip.

"[Signed] F. W. CLARK."

"WARRENTON, N. C., 24 May, '87.

"*To F. W. Clark:* We have 30-pound steel rail, and think, at a low rate of speed, it will bear one of your light engines. Your No. 5 can do this work, as it ran over our road one winter. Our engine can haul three passenger coaches, and can make trip from Warrenton to Warren Plains and return inside of thirty minutes. Will charge \$5 per coach, but suggest that you send your engine, as the time of arrival of excursion may conflict with our mail and freight schedules.

[Signed] O. P. SHELL."

"RALEIGH, N. C., 5-25, '87.

"*To Captain Smith, Superintendent:* Please read the attached message and say if our No. 5 can go through.

"[Signed]

F. W. C.

"By B."

"*F. W. Clark, G. P. A.:* My impression is that No. 5 engine is not in running condition. Please see Mr. Harding as to condition of engine No. 5. If she is in running order she can go over the Warrenton road.

Yours truly,

"[Signed]

"WM. SMITH, Superintendent."

"No. 5 engine is the regular engine on the Louisburg road. She is in running order.

[Signed] B. R. HARDING.

"May 25, '87.

"*To F. W. Clark, G. P. A.*"

"RALEIGH, N. C., June 7, 1887.

"*W. J. White, Warrenton Railroad, Warrenton, N. C.—*DEAR SIR: Referring to my telegraphic correspondence of May 19th and 24th with Mr. Shell, of your road, I presume Mr. Shell conferred with you in regard to the excursion discussed. We have arranged with the colored fire company of Raleigh to run an excursion train, consisting of three passenger coaches and one baggage car, Raleigh to Warrenton and return, on June 13th next. These parties also have an option on four coaches in addition to the above mentioned, and the train may consist of from four to eight coaches. It has been arranged by the superintendent of the R. & G. road to handle this train only between Raleigh and Warren Plains, since it is deemed unsafe for our engine to go over your road. In making this charter we have been governed by the telegram from Mr. Shell under date of May 19th, and will report collections to you at the rate of \$5 per car for such number of

coaches as may constitute the excursion train. This amount to cover the transportation of not more than sixty people to the car, two persons under 12 to be considered as one. Capt. Smith will confer with you in regard to the matter of schedule, and I ask you that you advise me that the necessary arrangements will be made for the handling of this train between Warren Plains and Warrenton.

"Yours truly,

"[Signed]

F. W. CLARK, G. P. A."

"WARRENTON, N. C., June 8, 1887.

"*F. W. Clark, G. P. A., Raleigh, N. C.*—DEAR SIR: Your favor of the seventh is received to-day. Mr. Shell conferred with me relative to the intended excursion, and I now confirm his telegrams to you. We can haul three coaches at a time, but as our road is only three miles long, we can soon put them here and back to Warren Plains.

Yours truly,

"[Signed]

WM. J. WHITE, President W. R. R."

The plaintiff, under these conditions, became a passenger on the excursion train, and, while in a coach on the track of the Warrenton Railroad, suffered the injury for the redress of which he brings this action against the defendant, and caused, as he alleges and as the jury find, by mismanagement and negligence of the officers and servants of that company, without that concurring negligence on the part of the plaintiff which would exonerate it from liability therefor. The controversy is as to the responsibility of the defendant company, under these arrangements for the misconduct and consequent damage of the officers and agents of the short connecting line; and the instructions asked for the defendant all proceed upon the idea of a sole responsibility resting upon the latter.

The instructions asked and refused, in substance and condensed in form, are these: (1) If the companies are separate and independent corporations, the disaster having occurred on the Warrenton Railroad, managed by its officers, the first issue,

Instructions. "Was the plaintiff injured by the default and negligence of the defendant?" should be answered by the jury "No." (3) That there is no evidence of negligence on the part of the defendant's employees, or of any injury resulting therefrom. (4) If the contract was that the defendant should run the train to Warrenton, it did not impose on it a liability for the negligence of the connecting company. (5) There is a fatal variance between the allegations in the complaint and the facts in proof. (8) One company can only become responsible for the default of another by express agreement, and the issuing of a ticket securing a passage over another line is not evidence of such agreement, and none has been offered. (9) If the injury was suffered on the Warrenton Railroad, the jury must say to the first issue, "No." (11) If the defendant has shown that the plaintiff

was drunk at the time of the collision of the trains and not as well able to look after his safety as if sober, such drunkenness was a co-operating agency; and the second issue, "If so, did the plaintiff by his own negligence contribute thereto?" must be answered in the affirmative. (14) It is the duty of the railroad company to exercise the highest degree of care in providing for the safety of passengers over its own track, yet this duty terminates when they are delivered to an independent connecting line, and there is no evidence that defendant's employes had any right to look after or run the train on the Warrenton road. (17) There is no evidence of defendant's culpability, and, if held to be culpable in law, the damages recoverable are only for a breach of the contract to convey the plaintiff to Warrenton, and no damages have been shown. (20) If plaintiff bought his ticket from Hoover or the fire company, the plaintiff must look to him for compensation, and not to defendant.

It was in evidence that the passengers were all safely conveyed to Warren Plains station, and then it became necessary to divide the train and carry the coaches in separate sections to Warrenton; that while the first section was at Warrenton, stationary, the second section came at a speed of 25 or 30 miles an hour, and, there being no air brakes on it, nor brakemen, sufficient to arrest its rapid motion, it came in violent collision with the first, both being smashed, and the plaintiff was injured. The testimony was conflicting as to the condition of the plaintiff from drinking, and whether he was in any default, or wanting in self care, by which the injury could have been averted. The instructions asked for the defendant, and given, are substantially as follows: (2) The defendant's giving authority to Hoover to sell the plaintiff a ticket for carriage to Warrenton and back does not constitute a contract with the plaintiff that defendant would be responsible for the negligence of the other company. (6) If defendant's agent told Hoover his company could not carry the excursion further than to Warren Plains and, at Hoover's request, the agent made a contract with the Warrenton Company for the additional transportation, the issue of negligence must be found in favor of the defendant. (7) If the understanding with Hoover was that defendant should manage the train on its road and the other company manage it after passing upon its track and thus complete the carriage to the terminus agreed on, the defendant is not liable. (10) If the plaintiff was drunk, and the conductor tried and failed to arouse him, and if in this condition he was injured, and, had he been sober, could have escaped, the second issue must be found for the defendant. (12) If the conductor on the Warrenton road told the plaintiff of his danger, and directed him to move, and if for any reason he did not move, then he did contribute to his own hurt, and the second issue must be found in the

affirmative. (13) If, after being advised by the conductor of his peril, the plaintiff was directed to apply the brakes or request someone else to apply them and he did neither, without sufficient excuse, and there is no evidence of matter in excuse, he is in such a sense the cause of his own injury as to deprive him of recourse upon the company for the negligence of its own agents. (15) While Shell may be an agent of the defendant at that station to receive freight and issue tickets, he might also exercise an agency for the other company, and his acts in the latter capacity would not be binding on the defendant; and there is no evidence that in what he did in respect to the excursion train in entering upon and passing over the Warrenton track, he was acting for the defendant. (21) If anyone warned the plaintiff of his danger, and advised him to go into the other coach, where if he had been he would have avoided injury, then he did contribute to his own injury. The court further charged "that if the jury shall believe from the evidence that C. W. Hoover, acting for the said fire company, contracted with the defendant for the excursion train to run from Raleigh to the town of Warrenton and return, and that the defendant made a special contract with the Warrenton road to take the excursion train from Warren Plains to Warrenton and return, and that the said Warrenton road acted as the agent of the defendant in carrying said excursion train from Warren Plains to the town of Warrenton and return, and the plaintiff was injured by reason of the negligence of the said Warrenton road, then the plaintiff is entitled to recover, provided plaintiff did not contribute to his own injury." The defendant excepted because there was no evidence of any partnership or agency to bind the defendant. The exceptions are intended to comprehend all the instructions which, when requested, the court declined to give, and such as were given outside of them without a specification of the errors they are supposed to contain. In our opinion the charge was quite as favorable to the defendant as its counsel could reasonably require, and in some particulars more so. But as the plaintiff, having secured a verdict, does not complain, we shall not review them.

The principal contention, and to this central enquiry the various matters in controversy all tend, is as to the scope and effect of the contract for the excursion beyond the defendant's own lines, and its liability for the consequences of negligence upon another connecting line. While it is true that an arrangement entered into among roads which by their union form a route between distant *termini*, to facilitate transportation, each acting as forwarding agent for the other at their points of connection, does not of itself and especially when the common liability is disclaimed in the freight bill or passenger ticket, render each liable

Connecting
carriers—
Liability of
contracting
company.

for the default of the others, as is held in *Phifer v. Carolina C. R. Co.*, 89 N. C. 314; *Weinberg v. Albemarle & R. R. Co.*, 91 N. C. 31; *Knott v. Raleigh & G. R. Co.*, 98 N. C. 73; 32 Am. & Eng. R. R. Cas. 481. It is not less well settled that where there is a special contract to transport to a point beyond the contracting company's line, the companies whose services are required in the execution of the contract become an agency, severally, of the first, in fulfilling its terms and giving it effect. In a note to the case of *Quimby v. Vanderbilt*, quoted from 17 N. Y. 306, in *Thomp. Carr.* 423, in which it is decided that one of several connecting lines may bind itself for a safe transportation over the other lines, and whether such is the contract must be determined upon the evidence, the author, adverting to repugnant rulings in different courts, says: "The weight of authority is that if a carrier undertakes to carry a passenger and his baggage to a certain destination, he is responsible for his safety and that of his baggage, as carrier, throughout the whole distance, whether the franchise and means of conveyance, when the injury or loss occurs, be owned or controlled by him or some other carrier;" and a very large number of cases are referred to as so ruling. This liability is the legal result of a special contract to convey between two designated points and to provide adequate means of conveyance over the route between them; and such, in our opinion, is very clearly the contract in the present case, and so it seems to have been understood between the parties. A single charge is made for the whole trip and the train is to pass over both roads in reaching the agreed terminus; the defined conditions attach to the entire route; a separate arrangement is made between the two companies for the carriage by the Warrenton Company over its short line; and a price stipulated to be paid by the other for the necessary service. Besides these evidences of the common understanding of the contract, its terms are direct and specific themselves; and, as the defendant agreed to run the train to Warrenton, necessarily it must make some arrangement with the other line in order to fulfil it. The defendant's liability, therefore, commensurate with their agreement, covers the entire transportation, and the Warrenton Company and its agents became *pro hac vice* the defendant's agents in consummating it. It was therefore entirely proper to charge in the complaint the disaster as proceeding from the defendant's negligence, the negligence of the employes being in law the negligence of the employer. So, too, the common law imposes upon a common carrier, conveying passengers under a special contract which admits to the coaches such as may pay, an obligation to carry safely, and to use proper care and vigilance in the management of the train.

We find no error, and must affirm the judgment.

Carriage of Passengers—Connecting Carriers—Liability.—In *Redfield on Railways*, Vol. II. p. 267, it is declared that as the general duty of common carriers of passengers is different from that of common carriers of goods, so the implied contract resulting from the sale of through tickets for passengers is different. Through tickets, in the form of coupons, which are purchased of the first company, and which entitle the person holding them to pass over successive roads with ordinary passenger baggage, sometimes for thousands of miles, in this country import commonly no contract with the first company to carry such person beyond the line of their own road and are to be regarded as distinct tickets for each road, sold by the first company as agents for the others so far as passenger is concerned; and unless the first company check the baggage beyond their own line, it is questionable perhaps how far they are liable for losses happening beyond their own limits. In *Thompson's Carriers of Passengers*, p. 412, a different rule is declared to be the law, and it is stated that the carrier who first received the passenger and with whom the contract of transportation was made, is held to the same degree of liability as if this company owned and controlled the entire length of line traversed, the reason being that the carrier having contracted to furnish his passengers with a safe, expeditious and comfortable passage, is presumed to have the means of so doing,—at least is bound to do it. The latter rule is supported by the following cases, viz: *Birkett v. Whitehaven Junction R. Co.*, 4 Hurl & N., 730; *Great Western R. Co. v. Blake*, 7 Hurl & N., 987; *Buxton v. North Eastern R. Co.*, L. R. 3 Q. B., 549; *Murch v. Concord R. Co.*, 29 N. H., 9; *Seymour v. Chicago etc. R. Co.*, 3 Biss. (U. S.) 43; *John v. Bacon*, L. R. 5 C. P., 439; *McLean v. Burbank*, 11 Minn. 277; *Latch v. Rumner*, 27 L. J., Exch. 155; *Thomas v. Rhymney R. Co.*, L. R. 6 Q. B. 266; s. c., L. R. 5 Q. B. 226, whilst the rule that the contracting company is not responsible beyond the limits of its own line has been sustained in the following cases: *Pennsylvania R. Co. v. Connell*, 112 Ill. 295; s. c., 18 Am. & Eng. R. Cas. 339; *Pennsylvania R. Co. v. Schwartzenger*, 45 Pa. St. 208; *Hood v. New York & New Haven R. Co.*, 22 Conn. 1; *Furstenheim v. Memphis & O. R. Co.*, 9 Heisk. (Tenn.) 238; *Nashville & Chattanooga R. Co. v. Sprayberry*, 9 Heisk. (Tenn.) 852.

Where coupon tickets, which indicate upon the face a separate service by the different roads are purchased, it has been held that the import of such a transaction is that the ticket for the passage upon roads beyond its own line are sold by the first road as agent for the others, and that the obligation and responsibilities of the carrier of persons over other roads than its own are not thereby assumed unless its relation to those roads, by contract or otherwise, is such as to compel, or at least consist with that character. *Hartan v. Eastern R. Co.*, 114 Mass. 44; *Knighi v. Portland S. & P. R. Co.*, 56 Me. 234. But in Georgia, a contrary rule has been adopted, and it has been held that a railroad company which sells and issues through tickets to passengers over its own line of road and the lines of road of other companies is liable for the sure and safe transportation of such passengers or persons to the point of destination notwithstanding it may be endorsed or printed on the ticket so sold and issued, that the company issuing and selling such tickets shall not be liable except as to its own line of road. *Central R. Co. of Ga. v. Combs*, 70 Ga. 533; s. c., 18 Am. & Eng. R. R. Cas. 298. So too, it has been held that a ticket entitling the passenger to travel over the line of the company issuing it and connecting lines to the destination specified in it, is transferable in the absence of any limitation in the contract, and upon the refusal of the connecting line to accept the ticket and of the contracting company to furnish a local ticket over the connecting line, the holder has a right of action against the contracting company for breach of contract. *Hudson v. Kansas Pacific R. Co.*, 3 McCrary (U. S.) 249. Where, however, a contracting company issues a ticket to a point on a connecting line and the conductor upon the train collects the same from the passenger and issues instead a railroad check entitling him to travel over the connecting line which is accepted by the conductor of the latter company, the connecting company is liable for the injury sustained by the passenger whilst upon its line. *Schopman v. Boston & W. R. Co.*, 9 Cush. (Mass.) 24.

NEW YORK, PHILADELPHIA AND NORFOLK R. CO.

v.

COOPER'S ADMINISTRATOR AND OTHERS.

(Virginia Supreme Court of Appeals, April, 1889.)

Passenger—Claim Against Third Party—Imputable Negligence.—Where a passenger is injured by a collision, the negligence of the carrier is not imputable to him for the purpose of barring his right to recover for the negligence of a third party causing the collision.

Same—Degree of Care.—In an action to recover damages for the death of a passenger on a steam boat, it is not error for the court to refuse to instruct the jury that one boat owed a greater degree of diligence to the passenger than the other, the question being not the degree of vigilance due by the carrier, but whether the defendant was guilty of negligence which contributed to the injury.

Collision—Tug and Tow—Lights—Crossing Course.—A tug with a barge in tow was proceeding across the course of a ferry boat. The night was dark and stormy, and none of the colored lights of the tug or tow were visible to the ferry boat, being hid by the relative position of the tug and barge. The tug and barge bore down on the ferry boat and attempted to cross her bow close upon her, when a collision occurred. *Held*, that it was negligence on the part of the tug thus to attempt to cross the ferry boat's course when, owing to the situation of the lights, the ferry boat could have no warning of its proximity.

ERROR to Circuit Court, Norfolk County.

Action against the New York, Philadelphia & Norfolk R. Co. and others to recover damages for negligently causing the death of the plaintiff's intestate. The New York, Philadelphia & Norfolk R. Co. brings error to review a judgment for the plaintiff.

LACY, J.—This is a writ of error to a judgment of the circuit court of Norfolk county, rendered on the 22d day of December, 1887. The case, so far as it is necessary to be stated, is as follows: The Portsmouth, a steam tug, belonging to, and in the employment of, the plaintiff in error, with a railroad barge in tow, started from the Norfolk Southern Railroad wharf in Berkley, a suburb of Norfolk, about the hour of 8:45 P. M., to go to the wharf of the plaintiff in error at the foot of Water street in Norfolk city. Just above Norfolk city the Elizabeth river is divided into two branches, and the village of Berkley is situated on the point between the two branches; while the cities of Norfolk and Portsmouth, lying on each side of Elizabeth river, stretch upwards along the said river opposite to Berkley, and the said river constitutes what is called the inner harbor of Norfolk. The village of Berkley, at the head of the Norfolk harbor, lies between the upper end of the

Statement
of case.

cities of Norfolk and Portsmouth, separated from Norfolk by the eastern branch of Elizabeth river, and from Portsmouth by the southern branch, and it lies nearer to Portsmouth than to Norfolk. A ferry boat called the "Manhasset," which is a small passenger steam boat, plies regularly at short fixed intervals across the Elizabeth river between the ferry slip in Norfolk and the ferry slip in Portsmouth. These slips not being opposite, the course of the ferry-boat is diagonally across the Elizabeth river. The two courses of the said boats, as indicated, crossed; and in respectively moving along the said courses on the night in question, which was dark and stormy, a gale blowing from the north against the bow of the tug and her tow, which was loaded heavily with three rows of freight cars, on the port side of the ferry boat, a collision occurred, by which the tow of the tug broke up the ferry boat, carrying away the whole of the ladies' cabin and the wheel house on the port side, and killing the wife of the defendant in error. When the tug left her wharf in Berkley, she was 233 yards from the Portsmouth ferry slip diagonally across the southern branch, and in full view of it, as shown by its lights. The distance from Norfolk to Portsmouth is less than two-thirds of a mile, and it takes the ferry boat between five and six minutes to make the whole distance, and when the collision occurred the ferry boat was about three-fourths of the way across from Norfolk to Portsmouth. The action was brought by the defendant in error against both the plaintiff in error and the owners of the ferry boat, and judgment recovered against each in the sum of \$4,750. The plaintiff in error applied for and obtained a writ of error from this court.

The first error assigned here is the action of the circuit court in giving the instruction asked for by the plaintiff, as set forth in bill of exceptions "A," in effect, that if the jury should believe from the evidence that the navigators of both the ferry boat and the tug and barge were guilty of carelessness and negligence in so doing, and that the death of Mrs. Fanny L. Cooper, the wife of the defendant in error, was caused by the negligence of both those navigating the ferry boat and tug and barge, both contributing thereto, then the jury should find against all the said defendants; but if they should believe the injury was caused by the negligence of those only who navigated either the ferry boat on the one hand, or the tug and barge on the other, then the verdict should be against the party so causing the injury. The objection to this instruction is that each boat is held to the same degree of diligence, whereas the defendant owner of the tug and tow claims that as the deceased, the said wife of the defendant in error here, was a passenger on the ferry boat, that a contract relation existed on the part

**Injuries to
passenger—
Imputable
negligence.**

of the ferry boat and the passenger, and called for extraordinary vigilance, aided by the highest skill, and rendered the ferry boat liable for the slightest negligence, whereas the tug and tow had no contract relation with the deceased, and were liable to exercise only ordinary care and diligence, which is embodied in an instruction set forth in bill of exception "I," which was refused by the court. This contention of the plaintiff in error is based upon the idea that the negligence of the carrier is imputable to the passenger who has confided himself to its care: it being decided in the English case of *Thorogood v. Bryan*, 8 C. B. 115, where a passenger, in alighting from an omnibus, was thrown down and injured by the negligent management of another omnibus, that an action could not be maintained against the owner of the latter if the driver of the omnibus in which the passenger was riding, by the exercise of proper care and skill, might have avoided the accident which caused the injury; which was approved in the case of *Armstrong v. Railway Co.*, L. R., 10 Exch. 47, decided in 1875 (12 Moak, Eng. R. 508); *Houfe v. Fulton*, 29 Wis. 296; *Prideaux v. Mineral Point*, 43 Wis. 513; *Lockhart v. Lichtenthaler*, 46 Pa. St. 151; *Payne v. Chicago, R. I. & P. R. R. Co.*, 39 Iowa 523; *Carlisle v. Sheldon*, 38 Vt. 440, and in some other cases.

CLARK, J., said in the case of *Noyes v. Town of Boscawen*, 10 Atl. Rep. 692: "The rule that the negligence of the driver or manager of a vehicle is to be treated as the negligence of a passenger, in an action by the passenger against a third party, is put upon the ground that the passenger, in selecting the conveyance, has placed himself in the care of the driver, and hence must be taken to be in the same position; and the driver, as to third persons, is to be so far regarded as the agent or servant of the passenger as to make the latter chargeable with the driver's negligence, and hence not entitled to recover, although he may have been free from fault himself." The learned judge, proceeding, said: "In the absence of any relation of master and servant, or principal and agent, when each is independent of control by the other, why should a passenger be chargeable with the driver's negligence, any more than the driver with the passenger's negligence." We think that the traveller should be held to the exercise of reasonable care only in the selection of a driver; and, being in no default in the choice of a conveyance, and having no control over the management of the team, he should not be held responsible for the negligence of the driver, which he could not reasonably anticipate or prevent. LOPES, J., is quoted in the same case as saying (*Thorogood v. Bryan*, and *Armstrong v. Railway Co.*, having both been in the mean time overruled in the English court of appeals in the case of *The Bernina*, L. R., 12 Prob. Div. 58): "A passenger in an omnibus, whose injury is caused by the joint negligence of that omnibus and another, may, in my opinion, maintain an action either

against the owner of the omnibus in which he was carried, or the other omnibus, or both"—and was clearly of opinion to overrule *Thorogood v. Bryan*, as had been many times held before that. *Robinson v. New York C. & H. R. R. Co.*, 66 N. Y. 11; *Dyer v. Erie R. Co.*, 71 N. Y. 228; *Bennett v. New Jersey etc. R. Co.*, 36 N. J. Law 225; *New York, L. E. & W. R. Co. v. Steinbrenner*, 47 N. J. Law, 161; *Transfer Co. v. Kelly*, 36 Ohio St. 86, 91; *Wabash, St. L. & P. R. Co. v. Shacklet*, 105 Ill. 364; *Turnpike Co. v. Stewart*, 2 Metc. (Ky.) 119; *Louisville etc. R. Co. v. Case's Admr.*, 9 Bush 728; *Tompkins v. Clay Street Hill R. Co.*, 4 Pac. Rep. 1165; *Little v. Hackett*, 116 U. S. 366. The doctrine of *Thorogood v. Bryan* being declared to be unsound and in conflict with the principle that no one should be denied a remedy for injuries sustained without fault by him, or by a party under his control or direction; that the relation of master and servant and principal and agent does not exist in cases where the passenger has no control over the driver; that it is the right to control the conduct of the agent, which is the foundation of the doctrine that the master is to be affected by the acts of his servant, and that no one is responsible for the negligence of another, unless the latter is his servant or agent. The doctrine of *Thorogood v. Bryan* was much criticised by the English judges, and has been at last overruled there. It was never generally followed in this country, and may be now properly said to be altogether discarded, and rightly so. The passenger has no control over the driver of an omnibus, and certainly none over the conduct of a railway train or steam boat, on which he has taken passage. He has no control over the movements of either, and is in fact powerless to prevent the negligence of either. As is pointed out in the case of *The Bernina*, *supra*, if the passenger is so identified with the driver as to be deemed to be guilty of his negligence, and therefore to be deprived of a right of action, it must necessarily follow that, in addition to his rights being curtailed, his liabilities are correspondingly enlarged, and the result is that the passenger in an omnibus or other public conveyance, is necessarily liable to third parties for the negligence of the driver, which could be maintained upon no sound principle. See note in *Amer. Law Rep.* 27, 129.

In the case of *Webster v. Railroad Co.*, 38 N. Y. 260, which was a case of a passenger by one railroad suing another railroad for the consequences of a collision, it was held that the negligence of the defendant whereby plaintiff was injured, being established by evidence, and there being no pretence that the plaintiff was guilty of any personal negligence, the negligence of a third party contributing to the injuries furnishes no excuse for the negligence of the defendant, and no reason why it should not respond in damages. Hence the refusal of the judge to charge that, if the jury should find that the injuries were in part caused by the neg-

ligence of a third party, the plaintiff could not recover from defendant, was not error.

And so in this case the refusal of the court to instruct the jury that one boat owed a greater degree of diligence to the passenger than the other was not error, because the negligence of a third party could not be held to be the contributory negligence of the passenger, so as to bar his right to recover; the question being, not the degree of vigilance due by the third party, but whether the defendant was guilty of negligence which contributed to the injury; if the defendant was so negligent, then it was no defence for it that some other party was also guilty of negligence, unless that other party was such that its negligence could be imputed to the plaintiff by its being the servant or agent of the plaintiff, and under his control and direction, which was not this case.

But it is argued that in the case of *Norfolk & W. R. Co. v. Burge*, 32 Am. & Eng. R. R. Cas. 101, it was held that it was not error to refuse an instruction asked by the defendant because it failed to define the degree of care and cau- **Degree of care** tion required of the plaintiff to entitle him to recover. **—Instruction.** In that case the degree of care and caution or the contributing negligence of the plaintiff was of importance, because if he had contributed to the injury by his negligence he might be barred of recovery, and would be, unless the defendant, after discovering his negligence, had failed to use due diligence notwithstanding, to prevent the injury. *Dun v. Seaboard & R. R. Co.*, 78 Va. 645. But in this case it was not asked that the court should instruct the jury as to negligence of the plaintiff—none being claimed against him; but the request was as to the negligence of the third party, the co-defendant steamboat, which was properly refused, for reasons stated already in what has gone before. *The Washington v. The Gregory*, 9 Wall. 513; *The Alabama v. The Game-Cock*, 92 U. S. 695; *Colegrove v. New York & N. H. R. Co.*, 20 N. Y. 492; *Chapman v. New Haven R. Co.*, 19 N. Y. 341.

The next assignment of error is that the court gave the instruction set forth in the defendant's bill of exceptions "B," which was, in effect, that if the jury believed the stated circumstances as set forth above; that if the **Collision—Tug** tug with its tow left the Berkley wharf when the ferry **and tow-** boat was not in its Portsmouth slip, to go to the Nor- **Negligence.** folk wharf, and to cross the course of the ferry boat, then shortly due at Portsmouth, with the tide at a strong flood, in a dark and stormy night, and none of the colored lights of the tug or tow visible to the Manhasset, but that the same were hid by the relative position of the tug and barge, and that they could not be seen by any person on the ferry boat—then those navigating the said tug and barge were in fault, and guilty of

negligence. There can be no doubt of the propriety of this action of the court. The barge was an immense object, with all its colored lights hidden from view by its going backwards, and the tug, with its colored lights on the opposite side of the barge, very much lower than the barge, and the three rows of cars thereon, and altogether out of sight, while a gale of wind and a flood tide impressed their forces upon the ferry boat. Under these circumstances the tug and barge bore down upon the ferry boat, they were enveloped in total darkness except the stern light, a lantern upon the cars on the barge, which was at best misleading; and this not by an accident which resulted from the equal obscurity of the ferry boat, so that its locality in like manner could not be discovered by the navigators of the tug and barge. But with all the lights of the ferry boat brightly burning, both colored and white lights, and all her saloon windows throwing a bright light all around her, the lights of her Portsmouth slip close by, showing her destination, and the lights of her Norfolk slip not far off, showing her departure, and her course being well known (as well as their own obscurity) to the navigators of the tug and barge, it was in every sense an imprudence to attempt to cross her bow close upon her, or to rely upon the signal of a whistle to deflect her course, against the contingency of the gale, which was blowing against the tug, carrying back the sound of any whistle the tug might sound, so that it might not be heard in the ferry boat. Whatever light the ferry boat showed the tug when she left her Norfolk slip, she was not then either meeting or crossing, being too far off to do either, and her exact course was known and well defined, and the tug should have passed astern of her, especially when she was freighted with passengers; but before the collision the ferry boat showed her port light, and the tug was bound to pass on her port side, and that this was now impossible was the fault of the tug. The rule of navigation requires the steam vessel, such as the tug, to carry a red light on the starboard side, and a green light on the port side, in each case obscured astern, and showing only in front. The tug had these, but they were hidden completely by her tow. The barge had these, but, as it was moving stern foremost, its lights were obscured also. It was negligence thus to attempt to cross the course of the ferry boat across her bow, when she was thus driven by wind and tide, at an unusual speed, in total ignorance of the proximity of her immense and invisible destroyer. There was no error in the action of the court in giving this instruction. *Rev. Stat. U. S., § 4233, rules 4, 5, p. 816; The Pennsylvania, 19 Wall. 126, 135; The Eleanor, 17 Blatchf. 102; Samuel H. Crawford, 6 Fed. Rep. 906; The Frank P. Lee, 30 Fed. Rep. 277; The Titan, 23 Fed. Rep. 414; Briggs v. Day, 21 Fed. Rep. 727; Marshall v. Tug Conroy and Barge "E," 2 Fed. Rep. 785; The Howard, 30 Fed. Rep. 281.*

The next assignment of error which we will consider is the action of the court in refusing to set aside the verdict and grant a new trial to the defendant, as set forth in bill of exceptions "L." We think there was no error in that action of the court. The evidence has been sufficiently set forth already, and the jury were the proper triers of the facts; and the circuit court, under the circumstances of this case, rightly refused to set aside their verdict. In this court this question is considered as upon a demurrer to the evidence by the plaintiff in error, and there is no principle upon which we can reverse the finding of the jury in this case.

**Refusal to
grant new
trial.**

As to negligence of the Manhasset, we have no concern with that. A judgment was rendered against its owners because, as stated in argument, there was no special official lookout. That boat has not appealed, and the verdict and judgment of the court below as to it are final; and for reasons already stated, the question as to its negligence cannot affect the plaintiff in error in a suit by one of the passengers in the ferry boat against it.

This disposes of all of the questions raised and relied on in the argument here and in the petition. The same questions are stated in different forms, and under different heads, but we have considered and substantially disposed of them all in what we have already said, and it would be of no benefit to prolong this discussion further. We think, after a careful consideration of the whole case as presented here, that there is no error in the judgment complained of, and the same must be affirmed.

LEWIS, P. (*dissenting*.)—I dissent from the opinion of the court in this case. The record, in my opinion, discloses several errors for which the judgment should be reversed; but, as the order to be entered here will be final, and there will be no further trial of the case, I will call attention to only one or two of them.

It was palpable error, I think, to instruct the jury, as the circuit court did, against the objection of the appellant, that they must find for the plaintiff if they believed from the evidence that the collision and consequent death of the plaintiff's intestate was caused by the negligence of the defendant's agents, without accompanying the instruction with any explanation as to what negligence is. The authorities all agree that negligence, when the facts are disputed, is a mixed question of law and fact. It includes two questions: (1) Whether a particular act has been performed or omitted; and (2) whether the performance or omission of this act was the breach of a legal duty. The latter is a pure question of law for the court; the former a pure question of fact for the jury. *Shear. & R. Neg.*, § 11. Therefore, to enable the jury in the present case to intelligently decide whether the defendants had been guilty of negligence, it was necessary for them to be told

**Province
of jury—
Instruction.**

what legal duty the defendants, or either of them, owed to the plaintiff's intestate when the casualty occurred. A railroad company, like any other carrier who carries passengers by the agency of steam, is not only bound to exercise the highest degree of care in safely transporting its passengers, but it must repel by satisfactory proofs every imputation of negligence by a passenger. But it owes no such duty to a stranger, and in no case does it owe to a stranger the duty of exercising anything more than ordinary care. *Shenandoah Valley R. Co. v. Moose*, 83 Va. 827. These are rules which the law prescribes, and in respect to which it is the duty of the court to instruct the jury in a case like the present, when instructions are asked upon the subject, in order that the jury may say whether, upon the facts of the particular case, negligence is established. The rule that to questions of law the court responds, and to questions of fact the jury respond, is as old as the common law itself, and the court can no more, with propriety, surrender its functions to the jury than it can invade the province of the jury by taking from them and upon itself the decision of disputed questions of fact. Greenleaf says that where the question to be decided is a mixed one of law and fact, it is submitted to the jury, who are first instructed by the judge in the principles and rules of law by which they are to be governed in finding a verdict, and these instructions they are bound to follow. 1 Greenl. Ev., § 49. And in a note to the text it is said, by way of illustration of the rule, that "the judge is to inform the jury as to the degree of diligence, or care, or skill, which the law demands of the party, and what duty it devolves on him, and the jury are to find whether that duty has been done." I had supposed this principle was too well settled to be questioned. It has been repeatedly recognized by this court, and is the universally accepted doctrine.

In *Dun v. Seaboard & R. R. Co.*, 78 Va. 645, Judge LACY, speaking for the court, and citing numerous cases, used this language: "When the facts are disputed, the question of negligence is a mixed question of law and fact. The jury must ascertain the facts, and the judge must instruct them as to the rule of law which they are to apply to the facts as they may find them." The rule is well expressed by Beach in his work on Contributory Negligence, at section 161, who says that, as negligence is generally a mixed question of law and fact, "it devolves upon the court to say, as matter of law, what is negligence, and upon the jury to say, as matter of fact, in the light of the instructions from the bench, whether or not in the particular case at bar, the facts, as proven to their satisfaction, warrant the imputation of negligence. In other words, the court tells the jury what negligence is, and the jury tells the court what the facts of the case show upon the question of negligence. The judge defines negligence in the

charge, and the jury apply the definition to the facts in their verdict." And he very justly adds the remark that an uncounted multitude of authorities might be cited in support of this elementary proposition.

Nor has any authority been cited in support of the ruling of the circuit court, other than certain general expressions of some of the courts, in disapproving the doctrine of *Thorogood v. Bryan*, 8 C. B. 114, to the effect that a passenger in a public conveyance who, without fault on his part, is injured by the negligence of a third party, contributing to the injury, may maintain an action against such person, notwithstanding the contributory negligence of those in charge of the conveyance in which he is being carried. I certainly do not controvert this proposition, but concede it to be sound. The case of *Thorogood v. Bryan* was based upon a groundless fiction, and has been—rightly, I think—overruled. The point there decided was that a passenger in a public omnibus, who is injured by the negligent management of another omnibus, cannot maintain an action against the owner of the latter, if the driver of the former, by the exercise of proper care and skill, might have avoided the accident; and the reason assigned was that the passenger in selecting a vehicle so identifies himself with the vehicle and its driver that the negligence of the latter is to be considered the negligence of the passenger himself. But this reasoning is fallacious, as we know from every day experience that the passenger ordinarily exercises no control over the driver, and has no means of preventing his negligence. The doctrine has never been recognized in the admiralty courts, nor has it been generally followed in this country. On the contrary, it has been rejected by many courts of last resort, including the supreme court of the United States, in *Little v. Hackett*, 116 U. S. 366, and the case itself has been recently overruled in England. The *Bernina*, L. R., 12 Prob. Div. 58. I do not doubt, therefore, that the plaintiff in the present case may maintain an action against the appellant if the negligence of the latter contributed to the death of the deceased. But the question at last comes back, what is negligence? And that must be decided in the manner I have indicated. If the ruling of the circuit court be correct, then, indeed, not only must *Thorogood v. Bryan* be disregarded, but the law has been carried to the opposite extreme from what it was in England before that case was overruled; that is to say, the appellant may not only be sued with the owners of the ferry boat, for the alleged negligent killing of the plaintiff's intestate, but it must stand upon the same footing with the co-defendant, notwithstanding the deceased, at the time of the accident, was a passenger on the ferry boat, to whom, therefore, the owners of the ferry-boat owed the highest degree of care and skill, whereas the ap-

pellant owed her no higher duty than to exercise ordinary care in the management of its tug and barge. *New York, P. & N. R. Co. v. Kellam's Admr.*, 83 Va. 851-857. But surely this is not the law. The same rule by which the liability of the appellant would have been determinable if the action had been brought against it alone must be the test of its liability in a joint action like the present. Why should it not be so? Upon what principle can it be otherwise?

It was suggested in the argument that there is no contribution between tortfeasors, but this argument assumes as established the very point in dispute; the question being not one of contribution, but of original liability; in other words, whether or not the appellant was negligent. But how were the jury to determine that question, without being first told what legal duty the appellant owed the deceased? They were not presumed to know, without an instruction upon the point, and they ought not therefore to have been left in the dark, as they were, to determine it for themselves. It was plainly the duty of the court to have instructed them as to the rule of law by which they were to be governed in finding a verdict.

The recent case of *Norfolk & W. R. Co. v. Burge*, 32 Am. & Eng. R. R. Cas. 101, is an authority in point. In that case the injuries complained of were caused by a collision of a freight train of the defendant company with the plaintiff's truck, as he was driving from the wharf into a public street, in the city of Norfolk, from which the colliding train was being backed. At the trial the defendant moved the court to instruct the jury that although they might believe from the evidence that its agents failed to give the customary signals of the approach of the train, yet that the plaintiff was not entitled to recover if he could have discovered the approach of the train in time to have avoided it. The plaintiff objected to this instruction, and moved the court to instruct the jury, in lieu thereof, that he was bound to use only such care and watchfulness as a man of ordinary prudence, under the circumstances, would have used, and that if he used such care he was not guilty of contributory negligence. The court granted the motion, and instructed the jury accordingly, and this court affirmed the ruling of the trial court on the ground that, as the instruction which was refused did not define the degree of care which the plaintiff was bound to use to entitle him to recover, it was calculated to mislead the jury, whereas the instruction given, by correctly telling the jury what negligence in the particular case was, enabled them to properly apply the law to the facts of the case, and thus to arrive at a right conclusion, *i. e.*, to decide whether or not the plaintiff had been guilty of contributory negligence. This ruling is in harmony with the principle laid down in *Dun v. Seaboard & R. R. Co.*, 78 Va., *supra*, and is, in my

opinion, decisive of the present case; for why should it not be as much the duty of the court to define negligence when imputed to a defendant as when imputed to a plaintiff? Are not its constituent elements in either case the same? Do not the jury need enlightenment on the question of law involved as well in one case as in the other? Can a person who happens to be a defendant, any more than one who is the plaintiff in an action, be guilty of negligence, without the breach of a legal duty? And who but the court is to say what that legal duty is? I must confess I am unable to perceive any reason why the rule should not be so, nor am I aware of any authority which holds the contrary, where the question has been raised. Indeed, but for the decision of a majority of the court in this case, I would say the proposition was axiomatic.

It is therefore, to my mind, too clear for argument that, unless all legal rules as to the degree of negligence are to be abrogated altogether, the circuit court erred in giving the instruction above mentioned. And this error was intensified in its effects by the subsequent refusal of the court to give an instruction, on the motion of the appellant, to the effect that while the owners of the ferry boat owed to the deceased the exercise of extraordinary vigilance, the appellant merely owed her the exercise of the ordinary care usually observed by prudent men in the business in which it was engaged. This instruction correctly propounded the law, and ought to have been given. It is true that, if the first part of it, namely, that part relating to the duty of those navigating the ferry boat, had been offered separately, a refusal to give it might not have been error, to the prejudice of the appellant; but the refusal to give the latter part was calculated to mislead, and doubtless did mislead, the jury, and was therefore error for which, in my opinion, the judgment should be reversed. The case is stronger than many cases in which it has been held that, "though an instruction, as asked, is not wholly correct, yet, if the general refusal of it may mislead the jury, the court should either accompany the refusal with an explanation to the jury, or should give them an instruction stating the correct proposition." And the rule is certainly a very just one. *Institution v. McVeigh*, 3 S. E. Rep. 885, and cases cited.

There are, besides these, other errors, I think, in the record, but I will not enter into a discussion of them. I have only called attention to the questions to which I have referred because of their importance in the every day practice of the courts of the commonwealth. Many of the questions relating to the rules of navigation and the federal statutes on the subject, which were argued before us, were considered by Judge HUGHES, of the United States district court, in the case of *The Manhasset*, 34 Fed. Rep. 408,—a case growing out of the same collision,—and

were decided adversely to the views of the appellee here. The opinion in that case contains a very full and able discussion of the questions before the court, and I will do nothing more in this connection than simply refer to that opinion. I have already said more than I intended. I think the case was not properly submitted to the jury, and that the judgment ought therefore to be reversed, and the case remanded for a new trial.

Negligence of Carrier Not Imputed to Passenger.—The negligence of a carrier in whose train a person was at the time when he was accidentally killed, is not imputable to him; and in an action against two railroad companies for the killing of a passenger in the train of one of the defendants in a collision with the train of the other, a complaint alleging negligence in the operation of both trains is sufficient. Such an action may be maintained jointly against both companies whose companies whose combined negligence directly produced the injury complained of. *Flaherty v. Northern Pacific R. Co.* (Minn.) 40, N. W. Rep. 160. In this case the court said, "If the collision was caused directly by the concurrent negligence of both companies, both are responsible. The negligence of the common carrier upon whose train the deceased was a passenger was not imputable to him. *Follman v. City of Mankato*, 35 Minn. 522. It may be here stated that *Thorogood v. Bryan*, 8 C. B. 115, and *Armstrong v. Railway Co.*, L. R., 10 Exch. 47, referred to in *Follman v. City of Mankato*, as opposed to our decision in that case, have been recently expressly overruled in the English court of appeal. The *Bernina*, 12 Prob. Div. 58. The collision and injury having been caused directly by the concurrent wrongful acts or omissions of both defendants, all tending to produce the one resulting event complained of, the action against them jointly is maintainable, although there was no concert of action or common purpose between them. *Colegrove v. New York & N. H. R. Co.*, 20 N. Y. 492; *Cuddy v. Horn*, 46 Mich. 596; *Tompkins v. Clay Street R. Co.*, 66 Cal. 163. See language of *Lopes J.*, 12 in *The Bernina*, Prob. Div. 58, 99. See, also, *Stone v. Dickinson*, 5 Allen, 29, 31; *Chipman v. Palmer*, 77 N. Y. 57; *Slater v. Mersereau*, 64 N. Y. 138; *Cooper v. Transportation Co.*, 75 N. Y. 116."

The negligence of a common carrier is not imputable to a passenger for the purpose of barring his right to recover against a third party. See note, 22 Am. & Eng. R. R. Cas. 255; *State v. Boston & M. R. Co.*, 35 Am. & Eng. R. R. Cas. 356.

HILLS

v.

RICHMOND AND DANVILLE R. CO.

(*U. S. Circuit Court, N. D., Georgia, June 16, 1888.*)

Court—Jurisdiction—Cause of Action.—Where the record shows that the person served with process was the superintendent and manager of a continuous line of railroad running from Atlanta, Ga., to North Carolina, through the state of South Carolina, and that plaintiff, while aboard a train of cars running over this line and while in the latter state, was injured through the defective condition of the track, the Georgia courts have jurisdiction of the cause although it did not originate in that state.

Same—Service of Process—Lessee of Railroad.—Under the Georgia statute which

provides that the lessees of any railroad shall be subject to the same jurisdiction as the lessors were before the lease, service of process is sufficiently made by leaving a copy of the declaration at the place which is alleged to be the principal office of the lessee and to have been the principal office of the lessor.

ACTION at law to recover damages for personal injuries.

N. Y. & T. A. Hammond for plaintiff.

Pope Barrow and *Jackson & Jackson* for defendant.

NEWMAN, J.—The demurrer filed in this case makes the question that the cause of action did not originate in the county of Fulton or State of Georgia, but did originate in the State of South Carolina, therefore the Georgia courts have no jurisdiction. That foreign corporations may be sued in Georgia is well settled. *Berry v. Montgomery & R. R. Co.*, 39 Ga. 554; *Insurance Co. v. Carrugi*, 41 Ga. 660; *Wilson v. Danforth*, 47 Ga. 676; *Atlantic & R. Co. v. Jacksonville & R. Co.*, 51 Ga. 458. The qualification to this rule is stated to be that it cannot be sued for wrongs done or contracts made in another state. This is said to be decided in the case of *Bawknigh v. Insurance Co.*, 55 Ga. 194. That was a suit on a foreign judgment against a foreign insurance company. The decision of the court is that "Georgia courts have no jurisdiction of suits *in personam* against a foreign corporation unless the contract sued on has been made in Georgia, or the Georgia agent is connected therewith within the scope of his authority as the maker of such contract." It is said by defendant's counsel that the same rule applies to torts as is here laid down as to contracts. Conceding all this, and following this decision, can it be said that the Georgia agent of the Richmond & Danville Railroad, who is served here, had no connection with the cause of action? The whole record shows that E. Berkeley, who was served, was the superintendent and manager of a continuous line of railroad running from Atlanta to Charlotte, N. C., through the state of South Carolina, and that plaintiff, while aboard a train of cars running over this line, through, and while in, the latter state, was injured by what is alleged to have been the bad condition of the track. Of this track the official served was in charge as the division superintendent of the defendant corporation. Moreover, he is not merely an agent, as in the *Bawknigh* Case; he is a division superintendent, operating and controlling an extensive line of railroad. I do not think, conceding that the rule laid down in that case is correct, that it is applicable to the facts of this case.

It appears, in addition to this, that the plaintiff is a citizen of Georgia. Shall it be held that a citizen of this state is required to leave the principal place of transacting the business of that division of a road on which he was injured to go into another state

to serve a subordinate officer who would, presumably, immediately forward papers served to the superintendent in Atlanta? I think not. The plea to the jurisdiction in this case sets up substantially the same defence as the demurrer, while the language of the plea attempts to bring the case within the case in 55 Ga., *supra*. I think the whole record, taken together, shows that the track on which the alleged accident happened, the train which was derailed, and the employes in charge of the train, were under the superintendent's charge, and consequently the matter in which the cause of action originated was within the scope of his authority as such superintendent.

This view of the subject controls the further question made,—that a railroad company in Georgia can only be sued in the county where its principal office is located, or where the wrong was committed. It is a foreign corporation, the lessee of the Atlanta & Charlotte Railway. The declaration alleges that the principal office of the lessee is, and that of the lessor was, in Fulton county, Ga. Service is made by leaving a copy at the office of the superintendent in Atlanta, Fulton County, Ga. Code, § 3407; Acts 1884-85, p. 49.¹

I think that the court has jurisdiction, and that the service is good. The demurrer to the declaration must be overruled, and the plea to the jurisdiction held insufficient. As to jurisdiction of the United States courts in cases of this character, see *Sayles v. Insurance Co.*, 2 Curt. 212; *Block v. Atchison, T. & S. F. R. Co.*, 21 Fed. Rep. 529; *U. S. a. Telephone Co.*, 29 Fed. Rep. 17.

MISSOURI PACIFIC R. CO.

v.

IVEY AND OTHERS.

(*Texas Supreme Court, October 18, 1888.*)

Passengers for Hire—Persons Attending Live Stock—Agreement with Company.—The consideration for the carriage of a person in charge of live stock is found in the services which he renders in taking care of the cattle, or in the charges made for shipping the same, and such person being a passenger for hire, the true relation of the parties is not changed by an agreement that he shall be deemed an employe of the company to whom the company shall only be liable as to its regular employes.

Same—Limiting Liability.—A common carrier cannot by contract exempt

¹ "The lessees of any railroad . . . shall be liable to suit of any kind in the same court or jurisdiction as the lessors or owners of the railroad were before the lease."

itself from liability for injuries and damages to passengers, resulting from its own negligence or the negligence of its servants.

Evidence—Declarations—Res Gestæ.—Statements made by parties standing around the camp fire an hour or two after a collision, are not part of the *res gestæ* and cannot be admitted in evidence.

APPEAL from District Court, Bell County.

Action against the Missouri Pacific R. Co. to recover damages for negligently causing the death of the plaintiff's decedent. The defendant appeals for a judgment from the plaintiff.

At the trial the defendant objected to the reception in evidence of an answer to the ninth interrogatory to a witness named Tarpley, which was in the following terms: "Could Ivey by any act or effort on his part have done anything which would have prevented the collision of the trains?" Ans. "He could not have prevented the collision, but he had plenty of time to get out of the way of it. When I left the caboose I got some torpedoes and told him I was going back to stop the second section of the train." The interrogatory and answer were admitted, notwithstanding the defendant's objection.

R. C. Foster and A. E. Wilkinson for appellant.

Harris & Saunders for appellees.

COLLARD, J.—It is insisted by the appellant, the Missouri Pacific Railway Company, that Ivey, the deceased, at the time of the collision of trains causing his death, was an employee of the company; and that, such being the case, the company would not be liable to his heirs if his death was the result of negligence on the part of his fellow servants. This point is made in several different assignments, and is ingeniously presented by counsel for the company. Case stated.

One J. P. Higgins shipped cattle on defendant's road from Fort Worth to the stock-yards in East St. Louis, under a contract. There is an agreement endorsed on the back of the contract, and signed by Ivey, as follows: "We, the undersigned persons in charge of the live stock mentioned in the within contract, in consideration of the free pass granted us by the Missouri Pacific Railway Company, and of the other covenants and agreements contained in said contract, including the rules and regulations at the head thereof and those printed on the back thereof: all of which, for the consideration aforesaid, are accepted by us, and made a part of this our contract, and all the terms and conditions of which we hereby agree to observe and be severally bound by,—do hereby expressly agree that during the time we are in charge of said stock, and while we are on our return passage, we shall be deemed employees of said company for the purposes in said contract stated; and that we do agree to assume, and do hereby assume, all risks incident to such employment; and that said company

shall in no case be liable to us for any injury or damages sustained by us during such time, for which it would not be liable to its regular employes."

The first question presented to us by the record then is, Was Ivey in fact an employe of the company at the time of his death?

The regulations referred to in the foregoing agreement have this provision: "For the purpose of taking care of the stock, the owner or the men in charge . . . will be passed on the train with it; and all persons thus passed are at their own risk of any personal danger whatever, and will sign an agreement to that effect, endorsed on the contract." Looking at the contract

itself, we see that it states that the rates charged for the shipping of the cattle are declared to be lower than the usual rates; and in consideration thereof there are many stipulations of the shipper, releasing the company from damages for losses and injury to the stock and limiting its liability as a common carrier. It also contains substantially the following stipulation by the owner: "Third. At his own risk and expense he is to take care of, feed, water and attend to the stock, while in the stock-yards awaiting shipment, while being loaded, transported, unloaded and reloaded. He is to unload and reload at feeding and transfer points and at destination, and is to hold the company harmless for any and all loss and damages to the stock while so in his charge, and cared for by him or his agents or employes." "Fifth. When the company shall furnish, for the accommodation of the owner, laborers to assist in loading or unloading the stock, they shall be subject to the owner's orders, and deemed his employes while so engaged; for whose acts he agrees to hold the company harmless." "Eighth. The contract forbids the holder or any other person to ride on any train except for the purposes and in accordance with the rules and printed instructions printed on the back of it; all of which are accepted as a part of it." "Tenth. The person in charge of the stock shall remain in the caboose while the train is in motion," etc.

It is impossible for us to say, from the stipulations in the foregoing contract and regulations, that Ivey was in the employ of the company. It is clear to us that the contract and regulations contemplated that he was to be in the employ of the owner and shipper. He went along in charge of the cattle, to care for them, feed and water them, load and unload them—all of which the owner, by the terms of the contract, was to do at his own expense and risk. So careful is the contract to include every stipulation that would relieve the company from responsibility for the cattle while in transit, that a clause is inserted making laborers furnished by the company to aid in attending to the stock the employes of the shipper, and subject to his orders. We do not intend to say the company should be acquitted from its ordinary responsi-

bility as common carriers of the stock by the various provisions of the contract to that effect; but we do infer from its terms and requirements that the person sent in charge of the stock had charge of them for the owner, under his employ as his agent and representative. It seems to us it could not be seriously contended that he was in the employ of the company. He started from Lampasas to attend to the cattle on the way. They were first shipped on the Gulf, Colorado & Santa Fe Railway to Fort Worth, and there reshipped on defendant's road.

Ivey signed the agreement endorsed on the back of the contract as the person provided for in the contract or regulations who should attend the cattle in transport for the owner. All the facts go to show that he was in the employ of the owner. It would be absurd to suppose otherwise. By the agreement endorsed on the back of the contract, he agrees that he is the employe of the company; but that is evidently a fiction to provide for the release of the company from damages for personal injuries occasioned by the negligence of its servants. It is a pretence, a subterfuge, upon which to predicate the discharge of the company for damages in a plausible form. The true relations of the parties cannot be changed by such an agreement. It states a fact which is untrue; the agreement that it is true does not make it so. It amounts to this: knowing that a contract would be of doubtful validity that absolved the company, or limited its liability as a common carrier of passengers, the contract was devised in which the passenger acknowledges himself to be an employe of the company, so as to contract for its limited liability upon such relation, and give it the semblance of legality. If the liability of a common carrier cannot be limited in express terms and by a direct agreement, it cannot be done upon false or counterfeited relations. Ivey was a passenger upon defendant's train—a passenger for hire. It attempted to make it appear that he passed free of charge for his own accommodation or for the accommodation of his employer, the owner of the cargo. The consideration for his passage is found in the services he renders in taking care of the cattle, a duty the law devolves upon the carrier, or it is found in the charges made for shipping the cattle.

The question arises: Can a common carrier absolve itself from liability, or limit its liability for damages for its own negligence or the negligence of its servants? This question has been decided adversely to the appellant by our own supreme court. In the case of *Gulf, C. & S. F. R. Co. v. McGown*, 65 Tex. 643, Mr. Justice Stayton decided that a free pass to a passenger, with a stipulation endorsed that the holder assumed all risks of accident to his person, without claim for damages upon the corporation, was a contract; and that it was illegal and contrary to public policy. We

Common
carrier—
Condition
limiting
liability.

quote some of the language of the opinion as authority for our guidance in this case. He says: "In the nature of things, the negligence of the agent, or whatever grade, as to matters within the scope of his employment, with reference to passengers, is the negligence of the corporation itself, which, all the American cases agree, fixes a liability which the carrier cannot be permitted to avoid by contract." "We are further of the opinion," he says, "that a railroad company cannot by contract lay down its public character as a common carrier of passengers, which the law, as well as the nature of the employment, fixes upon it, and become a private carrier."

We need not go on and quote further from the opinion, which is quite exhaustive in argument as well as in citation of authorities. It is sufficient for us that the law is, by that opinion, well established in this state; that, without a statute to that end, a common carrier cannot limit its liability by contract against the negligence of its servants or its own negligence. In the opinion the court cites approvingly the case of *New York C. R. Co. v. Lockwood*, 17 Wall. (U. S.) 357, in which the opinion was delivered by Justice Bradley. Justice Stayton makes free extracts from the case in support of his views, and commends the opinion as one of admirable clearness and fullness.

The Lockwood case was very similar to the one at bar; it was concerning the liability of a common carrier upon a "drover's pass," in which it was agreed that the company should be held harmless for personal injury, to himself or whomsoever went with the cattle. The drover was to go along with his cattle, to load them, assuming all risks of injury to them or of personal injury to himself. The acceptance of the pass was to be considered a waiver of all claims for damages received on the train. After a comprehensive discussion of the question, and a careful review of the authorities, both in America and England, Justice BRADLEY declares such contracts are in contravention of public policy; and reaches the following conclusions: "First, that a common carrier cannot lawfully stipulate for exemption from responsibility, when such exemption is not just and reasonable in the eye of the law; secondly, that it is not just and reasonable, in the eye of the law, for a common carrier to stipulate for exemption from responsibility for negligence of himself or his servants; thirdly, that these rules apply both to common carriers of goods and carriers of passengers for hire, and with special force to the latter; fourthly, that a drover travelling on a pass, such as was given in this case, for the purpose of taking care of his stock on the train, is a passenger for hire."

It would be useless for us to amplify the arguments and reasoning in the two cases above cited,—one from our Supreme Court, and the other from the Supreme Court of the United States. We

are content to follow those cases and adopt their conclusions, without further discussion or elaboration of the doctrine. We believe it is and ought to be settled law that a common carrier cannot by contract exempt itself from liability for injuries and damages resulting from its own negligence or the negligence of its servants. The public have an interest in the contract, which a private individual cannot waive. If such liability could be avoided by contract, there would at once be an end to the liability altogether. Our conclusions are that we are to look to the real relations of the carrier and passenger, regardless of any fiction or pretence of agreement, and then to apply the law; to declare the liabilities arising from the actual relations of the parties, as the law and public policy demand. Ivey was a passenger for hire on defendant's train, and defendant owed him the same duties of care that would have been due to any other passenger upon a freight train. Ivey assumed the risk incident to such mode of travel; that is, the increased risk of riding on a freight, as distinguished from a passenger, train; but defendant would certainly be liable to him for its own negligence or the negligence of its servants, resulting in personal injury; and it would be liable to his wife, children and father, if his death resulted from the gross negligence of its servants.

We deem it unnecessary to comment upon the charges of the court objected to, or the charges asked by defendant and refused by the court, as the views herein expressed are sufficient to explain what in our opinion is the law of the case.

After defendant's testimony was concluded, Espey, a witness for plaintiffs, was recalled by plaintiffs, and asked: "What, if anything, did you hear any of the employees of defendant say at the time of the collision, or immediately there- **Evidence—** after with reference to when or how the front train **Declarations—** broke in two?" Defendant's witnesses had testified **Res gestae.** that the train had broken in two, and left the caboose and one other car behind, which had stopped before the collision had occurred. Plaintiffs' witness, Espey, who was in the caboose with Ivey at the time he was killed, had testified that the caboose had never stopped, but was moving when the collision took place. The evidence was material as tending to show that Ivey had or had not time to get off the caboose before the collision. Defendant's counsel objected to the question, because the declaration sought did not appear to be a part of the *res gestae*, but were hearsay, and could not be used to impeach defendant's witnesses, because no predicate had been laid for their impeachment. Plaintiffs' counsel then stated that the evidence was offered as *res gestae*. The objections were overruled, defendant excepting. The witness then answered: "I heard it stated on the ground that night that the collision was the cause of the breaking or uncoupling of

the train. I can't tell who said it; parties standing around the camp-fire there,—railroad men and others. This was within an hour or two after the wreck. I don't know whether Conductor Tarpley was present. It was talked over about the fire, and some of the brakemen, conductors and engineers were present. I heard it also asserted that the train had broken in two before the collision, and denied by others. Some of the farmers from the neighborhood had gathered there, and there was talk about hanging the engineer. He said he reversed his engine, and tried to stop the train; but it did not seem so from the way his engine kept grinding into the front train." The defendant then moved to exclude the testimony for the same reasons urged in the objection to the question. The court refused to exclude, and the defendant again excepted.

We do not think the evidence was admissible. It was not a part of the *res gestæ*. A statement of what parties said so long after the transaction could not be a part of the transaction. *Gulf, C. & S. F. R. Co. v. Moore*, 69 Tex. 157. In a suit on a policy of insurance, where the insured property was not destroyed by fire, and witness for defendant was permitted, over objection of plaintiff, to state, "There was some talk of arresting all the clerks that night for complicity in the fire" etc.,—the Supreme Court of this state declared: "The evidence was but a statement of what persons said who were present at the fire, which under no rule of law was admissible." *Dwyer v. Continental Ins. Co.*, 63 Tex. 356.

It was error to admit the evidence objected to in this case. The statements of bystanders were not admissible in any event, nor were the statements of employees of the company, made as mere narrations of past events. The talk among the farmers about hanging the engineer was not evidence at all, and was well calculated to prejudice the jury against the defendant.

We also hold that there was error in excluding the answer of Tarpley to the ninth cross interrogatory as set out in defendant's bill of exceptions. It is true the answer volunteered to state facts in addition to the matter enquired about; but it was evidence tending in some degree to show that Ivey may have been warned in time to have avoided the danger by the exercise of proper care. It may have had influence with the jury, though it was positively denied by Espey, who was with him at the time. Under the rule, as we understand it, as laid down in *Lee v. Stowe*, 57 Tex. 449, the objection goes to the manner and form of taking the depositions, and should have been made before the trial, and notice given to defendant. If notice had been given before the trial, of the objection, the irresponsible part of the objection should have been stricken out.

We are of the opinion that on account of the errors of the court in admitting and excluding evidence as herein pointed out,

the judgment of the court below ought to be reversed, and the cause remanded for a new trial.

ACKER, J., did not sit in this case.

STAYTON, Ch. J.: Report of Commission of Appeals examined, their opinion adopted, and the judgment reversed and the cause remanded.

Right of Owner Accompanying Live Stock.—In *Missouri Pacific R. Co. v. Aikin* (Tex.), 9 S. W. Rep. 437, the plaintiff sought to recover damages for personal injuries sustained by him while accompanying certain live stock which was being transported by the defendant. It was urged that although plaintiff had the right to travel upon the train, being the owner of the stock, yet as he had insisted upon the right of free transportation for one of his employes, and had refused to pay his fare, he thereby became a trespasser upon the cars. It was, however, held by the court that by so acting he was not deprived of his privilege under the contract.

Attendant Upon Live Stock—Contributory Negligence.—A person travelling on a train which has with it a stock-car carrying horses for him, his duty under this contract being "to feed, water, and take care of the horses," is not guilty of contributory negligence from the fact that he was on said car when he was injured, if he was on the car while stopped at a station in the performance of this duty, and had not finished when the train started off, after a stoppage of fifteen or twenty minutes, instead of forty-five, the usual time, and if it is not shown that he had opportunity before the accident to go to any other car. *Florida Ry. & Nav. Co. v. Webster* (Fla.), 5 So. Rep. 714.

Drover's Pass—Liability of Company.—The greater number of the decisions hold that a drover travelling upon a pass for the purpose of taking care of cattle is a passenger for hire; *Mastin v. Baltimore & O. R. R. Co.*, 14 W. Va. 180; *Little Rock & F. S. R. Co. v. Miles*, 13 Am. & Eng. R. R. Cas. 10; and consequently that a stipulation in the contract of carriage that the drover assumes all risk of accidents and releases the company from liability from all injury to personal property is against public policy and invalid. *Carroll v. Missouri Pac. R. Co.*, 26 Am. & Eng. R. R. Cas. 268; *Ohio & M. R. Co. v. Nickless*, 71 Ind. 271; *Ohio & M. R. Co. v. Selby*, 47 Ind. 471; *Indianapolis, B. & W. R. Co. v. Beaver*, 41 Ind. 493; *Graham v. Pacific R. Co.*, 66 Mo. 536; *Flinn v. Philadelphia etc. R. Co.*, 1 Houst. (Del.) 469; *Cleveland & A. R. Co. v. Curran*, 19 Ohio St. 1; *New York Cent. R. Co. v. Lockwood*, 17 Wall. (U. S.) 357. But if the drover rides upon the top of the car and the train is derailed, he is guilty of contributory negligence which shall defeat any recovery, if he would not have sustained any injury had he been travelling in the proper car. *Little Rock & F. S. R. Co. v. Miles*, 40 Ark. 298; s. c., 13 Am. & Eng. R. R. Cas. 10. And where a drover applied to a person who was having stock shipped to bill the horse under his charge as part of a drove shipped by the latter and this was done, and the drover entered the car intending to pay his fare if it should be asked for,—only one person being entitled to travel free with the stock,—in the absence of the actual receipt of the fare he is not a passenger, and if he is injured before the payment of the fare he can have no recovery against the company. *Gardner v. New Haven & N. Co.*, 51 Conn. 143; s. c., 18 Am. & Eng. R. R. Cas. 170.

In England, however, and in New York a different rule has been adopted and it has been held that if the drover agrees to travel at his own risk, the agreement is valid and he has no claim against the company. *Gallin v. London & N. W. Co.*, L. R., 10 Q. B. 212; *McCawley v. Furness R. Co.*, L. R., 8 Q. B. 57; *Duff v. Great Northern R. Co.*, L. R. 4 Ir. 178; *Poucher v. New York Cent. R. Co.*, 49 N. Y. 263; *Bissell v. New York Cent. R. Co.*, 25 N. Y. 442; *Boswell v. Hudson River R. Co.*, 5 Bosw. (N. Y.) 699. But see *Smith v. New York Cent. R. Co.*, 24 N. Y. 222. And under the contract the railroad company will be exempt from liability not only whilst the drover is travelling on the railroad, but also whilst the plaintiff is leaving the company's premises. *Gallin v. London & N. W. R. Co.*, L. R., 10 Q. B. 212.

LITTLEJOHN

v.

FITCHBURG R. CO.

(Massachusetts Supreme Judicial Court, February 27, 1889.)

Passenger—Negligence Causing Death—Statutory Liability.—Under the provision of the Massachusetts statute that damages for the death of a passenger shall be "assessed with reference to the degree of culpability of the corporation or of its agents or servants," there must be some degree of culpability on the part of the corporation or of its servants, and when the accident occurred through defects in a leased line which the lessor undertook to keep in repair, there can be no recovery against the lessee except it be shown that it had notice of the defective condition of the track.

Same—Defective Track—Constructive Notice.—Under the statute, the company is liable if the condition of the road before the accident would have indicated to a competent person, considering the care which is necessary when human life is involved, that the road was unsafe, whether the defect was in the original construction of the road or was due to a failure on the part of the lessor to make necessary repairs, or however otherwise it may have been caused.

Same—Children Carried Gratuitously.—The company is liable under the statute although the persons killed were children who were being carried without the payment of any fare.

APPEAL from Superior Court, Suffolk County.

Action against the Fitchburg R. Co. to recover damages for the death of two minor children. The road upon which the accident occurred belonged to the commonwealth and it was leased by it to the defendant, the commonwealth having undertaken by the lease to keep the road-bed in good condition. Defendant appeals from a judgment for the plaintiff.

George H. Torrey for appellant.

Rauney & Clark for respondent.

HOLMES, J.—If this were an action to recover for personal injuries, brought by a passenger who had paid his fare, it would make no difference in the defendant's liability whether the injuries were caused by the negligence of those who were in a strict sense the defendant's servants, or by that of a third person who managed the road over which the defendant had undertaken to carry the plaintiff. **Leased road** *McElroy v. Nashau & L. R. Co.*, 4 Cush. (Mass.) 400; **—Obligation of lessor—** *Eaton v. Boston & L. R. Co.*, 11 Allen (Mass.) 500; **Liability of lessee.** *White v. Fitchburg R. Co.*, 136 Mass. 321, 325; *Illinois Cent. R. Co. v. Barron*, 5 Wall. 90, 104. And the case would not be altered by the fact that the person in charge was the common-

wealth. *Peters v. Rylands*, 20 Pa. St. 497. There are weighty decisions, also, to the effect that in such an action the defendant is liable not only for negligence at the time of the accident, but for any defect in its appliances which might have been discovered at the time when they were made, although the defendant did not make them, and the defect could not have been discovered afterwards. *Hegeman v. Western R. Co.*, 13 N. Y. 9; *Pendleton v. Kinsley*, 3 Cliff. 416, 421; *Philadelphia & R. R. Co. v. Anderson*, 94 Pa. St. 351, 359; *Francis v. Cockrell*, L. R., 5 Q. B. 184, 501; *Grote v. Chester & H. R. Co.*, 2 Exch. 251, 255. Compare *Ingalls v. Bills*, 9 Metc. 11. See *Pennsylvania R. Co. v. Roy*, 102 U. S. 451; *Hutch. Carr.* §§ 509, 512. And see *Grand Rapids & I. R. Co. v. Huntley*, 38 Mich. 537, 546 (*citing* *Richardson v. Great Eastern R. Co.*, L. R., 1 C. P. Div. 342). Compare *Wright v. Midland R. Co.*, L. R., 8 Exch. 13. In some of the cases it is intimated that the negligence of the third person is imputed to the carrier. *White v. Fitchburg R. Co.*; *Peters v. Rylands*, and *Pennsylvania R. Co. v. Roy* *ubi supra*; *Wabash, St. L. & P. R. Co., Peyton*, 106 Ill. 534, 540. And in some instances at least, the declaration has alleged negligence on the part of the defendant only. See *Great Western R. Co. v. Blake*, 7 Hurl. & N. 987; *Buxton v. Northeastern R. Co.*, L. R., 3 Q. B. 549; *Thomas v. Rhymmey R. Co.*, L. R., 5 Q. B. 226, L. R., 6 Q. B. 266; *Peters v. Ryland*, *ubi supra*; *Hegeman v. Western R. Co.*, 13 N. Y. 9, 10. In an early case it was said: "Everything is a negligence in a carrier which the law does not excuse." *Dale v. Hall*, 1 Wils. 281, 282. On the other hand, the extreme liability imposed by the foregoing decisions very frequently has been referred to the carrier's implied contract or to what the passenger reasonably may understand that the carrier assumed. *Thomas v. Rhymmey R. Co.*; *Francis v. Cockrell*; *Peters v. Rylands*, and *Eaton v. Boston & L. R. Co.* *ubi supra*; *Nolton v. Western R. Co.*, 15 N. Y. 444, 447. Compare *Buxton v. Northeastern R. Co.* *ubi supra*; *Austin v. Great Western R. Co.*, L. R., 2 Q. B. 442, 446. And some judges have pointed out that the liability could not stand on the carrier's negligence and have suggested that the declaration ought to be varied accordingly. *Thomas v. Rhymmey R. Co.*, L. R., 6 Q. B. 266, 275, 40 Law J., Q. B. 89, 95.

These distinctions are not of much importance in actions at common law, brought by the passenger himself. But the present action is statutory and penal in its character. The statute does not extend the liability for personal injuries to those injuries which cause death, as in *Little v. Dusenberry*, 46 N. J. Law 614 (where, also, so far as appears, the defendant may have been negligent); it creates a liability of a different nature. The action which it gives to the administrator is merely a substitute for the indictment, also pro-

vided for; and it is expressly enacted that the damages shall be "assessed with reference to the degree of culpability of the corporation or of its agents or servants." Pub. St. c. 112, § 212. See *Carey v. Berkshire R. Co.*, 1 Cush. (Mass.) 475, 480; *Com. v. Vermont & M. R. Co.*, 108 Mass. 7, 12. This language imports that there must be some degree of culpability on the part of the corporation or of its servants, and is not satisfied by showing that the corporation assumed a contractual or *quasi* contractual responsibility for third persons, who were not its servants. Suppose, for instance, that the defect in the construction of the road was unknown both to the defendant and to the commonwealth, and could not have been discovered by either through the use of any degree of care, the fact that it was known to the private corporation that originally built the road could not be said to show culpability on the part of the defendant except by a wilful misapplication of words. We go one step further. Supposing that the defect was known to the commonwealth, and was not known, and could not have been known, to the defendant, the defendant was not negligent, whatever might have been its liability at common law in this case or the last. We do not mean to intimate that the facts show any ground for this last supposition. The defendant was bound to know the visible facts concerning the track over which it carried its passengers. So far as appears, therefore, it must be taken to have known the facts which, with our present knowledge, we see pointed out the cause, or a part of the causes, of the disaster. But it was entitled to go to the jury on the question whether those facts before the accident would have indicated to a competent person, considering them with the care which is necessary when human life is involved, that the road was unsafe. And under this statute it was entitled to the second ruling asked.

The plaintiff does not contest the correctness of the ruling asked, but suggests that it was unnecessary, because it was asked only as one ground for taking the case from the jury, and because it was undisputed that the improper condition of the road was visible. The two reasons offered are inconsistent with each other. We do not find any warrant for the first in the bill of exceptions; and with more hesitation we construe the exceptions to mean only that the filling of the ditch and the escape of water by working under the track were visible, and not that it was also manifest that they constituted a danger. The defendant now contends that, not only was it entitled to the second ruling asked, but the evidence disclosed no indications of danger, and that the case should have been taken from the jury on that ground. We cannot go so far as to decide what inferences the defendant ought to have drawn from the visible condition of the road in the situation where the accident happened. If the danger might

have been discovered by the exercise of due care, the defendant will be liable, whether the defect was in the original construction of the road, or was due to a failure on the part of the commonwealth to make necessary repairs, or however otherwise it may have been caused. If the defendant carried its passengers into a place which it knew or ought to have known was dangerous, it was negligent, although it did not create, and had no right to remove, the danger.

Whether or not there would be any difference between the defendant's common-law liability for the negligence of third persons not its servants, in the construction or maintenance of the road, to passengers who had paid fares, and its liability to those who were being carried lawfully, but passengers without consideration, may depend upon the true ground of liability, so far as it exists, when the defendant is itself free from blame, and perhaps is still open to argument. *Todd v. Old Colony & F. R. Co.*, 3 Allen 18, 20; *Flint & P. M. R. Co. v. Weir*, 37 Mich. 111, 114, 115; *Hutch. Carr.* § 567, note. But the defendant would be liable at common law for injuries caused by its own negligence to passengers carried gratuitously, and the statute makes no distinction between gratuitously and paying passengers, if the person killed is a passenger.

There is no doubt that the plaintiff's children were passengers. See *Todd v. Old Colony & F. R. Co.*, *ubi supra*; *Wilton v. Middlesex R. Co.*, 107 Mass. 108; *Wilton v. Middlesex R. Co.*, 125 Mass. 130; *Com. v. Vermont & M. R. Co.*, *ubi supra*; *Austin v. Great Western R. Co.*, L. R., 2 Q. B. 442.

Exceptions sustained.

DEWIRE

v.

BOSTON AND MAINE R. CO.

(*Massachusetts Supreme Judicial Court, January 4, 1889.*)

Passengers—Boarding Trains—Place Not a Depot—Implied Licence.—If a railroad company permits passengers to take trains at a place which is not a depot, a person taking the train at such place is not a trespasser; and when he has reached in safety the inside of a passenger car, he then, if not before, becomes a passenger.

Same—Travelling on Platform.—If a person who has boarded a train goes from one car to another whilst it is in motion for the purpose of finding a seat, although he takes all risks which are obvious or are incident to the motion of the train, he does not take the risks of a collision with a locomotive, engine, or other train.

ON exceptions from Superior Court, Suffolk County.

Action by James H. Dewire against the Boston & Maine R. Co to recover damages for personal injuries sustained by him in a collision. The train which the plaintiff entered came to a full stop before crossing another railroad track in order to comply with the statutory requirements. Although there was no depot at that point, the defendant company was in the habit of allowing passengers to enter trains there. The collision occurred after the train had again started.

C. G. Fall for plaintiff.

Solomon Lincoln and *W. T. Badger* for defendant.

FIELD, J.—It must be taken that the defendant held out no inducement or invitation to the plaintiff to take the train at the place where he took it, but that the jury might find on the evidence that the defendant permitted passengers to take trains at this place, and that the plaintiff, in taking the train, intended to become a passenger; and it is with reference to a person who takes a train under such circumstances, and with such an intent, that the correctness of the instructions asked for must be determined. The plaintiff was not a trespasser in taking the train, and when he had reached in safety the inside of a passenger car, then certainly, if not before, he became a passenger. *Merrill v. Eastern R. Co.*, 139 Mass. 233.

After he became a passenger we cannot distinguish his rights and duties from those of the other passengers. The injury was caused by a locomotive engine of the defendant company, which was carelessly driven by a servant of the company against the car on the platform of which the plaintiff was standing. There were no vacant seats in the car which the plaintiff first entered, and he passed towards the rear of the train, through one or two cars, in search of a seat, which he did not find. "While seeking a seat he came to the front platform of the last passenger car but one, and was standing upon this platform, looking through the door or window of the car in search of a seat. While he was standing in this position, the train continuing its motion at the rate of from five to eight miles an hour," the engine struck the car, checked or stopped its motion, and partially overturned it, and the plaintiff fell backwards, and was injured.

The instructions given to the jury upon the principal question were, in substance, that, if the plaintiff was upon the platform of the car intending to ride there, he could not recover; but if he was there "in the exercise of reasonable promptness, in attempting to secure a seat," and "his stop there was a reasonable one,"

and "he was not there for the purpose of riding," he might recover. In *Stewart v. Boston & P. R. Co.*, 146 Mass. 605, it is said that, "in going from one car to another of a rapidly moving train, merely for his own convenience, the plaintiff took upon himself the risk of all accidents not arising from any negligence of the defendant." In the case at bar the accident arose from the negligence of the defendant's servant, which must be regarded as the negligence of the company, and the question is whether there was carelessness on the part of the plaintiff which contributed to the injury. If it be assumed that a passenger who goes from one car to another of a moving train, for the purpose of finding a seat, takes all risks which are obvious or are incident to the motion of the train, yet it cannot be held that he takes the risks of a collision with a locomotive engine or another train. He could not foresee that such a collision was likely to happen, and his going upon the platform of a car would not tend in any degree to bring about such a collision, and if a collision were to occur it is difficult to say that a position on the platform would be more dangerous than one inside the car. Passengers have the right to assume, in the absence of any warning or evidence to the contrary, that one passenger car is as safe as another, and, if there is no regulation of the company forbidding it, it must be that passengers have the right to go from one car to another while the train is in motion, when their convenience requires it, and subject to the risks which are incident to such a proceeding. In the case at bar, we think that there was no want of ordinary care on the part of the plaintiff, so far as any injury from collision was to be apprehended, and that the plaintiff's conduct did not contribute in any degree to bring about the collision, nor the injury which resulted from it. There is no evidence that the consequences of the defendant's negligence could have been avoided by the exercise of reasonable care on the part of the plaintiff. The presence of the plaintiff upon some part of the train, which was struck or displaced by the colliding engine, was a necessary condition of the plaintiff's being injured thereby, but it was not in a legal sense a contributing cause of the injury.

Whether the plaintiff would have been hurt more or less than he was, if he had been inside the car, can only be conjectured, for all the passengers on the car were put in peril because the car was partially overturned by the collision. The plaintiff could not reasonably anticipate any danger from collision in going from one car to another, and he was injured because he happened to be on one part of the train rather than on another, and not because his position upon the platform peculiarly exposed him to such danger. We think that the instructions given were sufficiently favorable to the defendant.

Exceptions overruled.

Passenger—Personal Injuries—Travelling upon Platform.—If a passenger, knowing that the train is about to start, leaves his seat in the car and goes upon the platform, and is thrown down by the starting of the engine with no unusual or unnecessary jerk, he is guilty of contributory negligence and cannot recover. *Torrey v. Boston & Albany R. Co.* (Mass.), 18 N. E. Rep. 213.

It is evidence of negligence on the part of a passenger to ramble through the cars in a dark night when the train is running swiftly on a road having frequent and sharp curves unless there be some excuse or justification for so doing more than mere restlessness or curiosity. Accordingly, where it appeared that a passenger was last seen at the station getting on the train just as it was put in motion, that nothing more was seen or heard of him until his dead body was discovered the next morning on the track, that the deceased had previously been seen passing through the cars in the direction of the rear train, it is not error to grant a nonsuit in an action which is brought upon the ground that the defendant was guilty of negligence in attaching a saloon car to the rear of a train of passenger cars in such a manner that a space was left between the saloon car and the car in front of it, through which it was alleged the deceased fell. *State v. Maine Cent. R. Co.* (Me.), 16 Atl. Rep. 368.

KELLEY

v.

MANHATTAN R. CO.

(*New York Court of Appeals, March 5, 1889.*)

Passengers—Injuries Causing Death—Elevated Railroad—Snow Upon Steps.—In an action to recover damages for the death of plaintiff's decedent, it appeared that the deceased took a train upon an elevated road about 5 o'clock in the morning. Snow had for some hours previously been falling, and as the night was cold the steps leading to the street were slippery. The deceased, who was the worse of liquor, slipped when near the bottom and fell. The railroad company had not taken any precautions, either by sprinkling ashes or sawdust, or by removing the snow, to guard against accidents. *Held*, that considering the brief period which had elapsed between the cessation of the storm and the accident to the deceased, the railroad company were not guilty of negligence in failing to guard against accidents, and that there was no evidence upon which a recovery could be had by the plaintiff.

Same—Approaches to Car—Duty of Company.—In the case of approaches to cars, such as platforms, halls, stairways and the like, the railroad company is not bound to use the utmost care to prevent accidents but only ordinary care in view of the dangers to ye apprehended.

APPEAL from Superior Court of New York, General Term.
The case is stated in the opinion.

Howard Townsend (Brainard Tolls, of counsel) for appellant.

Ashbel P. Fitch (Henry H. Spellman, of counsel) for respondent.

PECKHAM, J.—This is an appeal by the defendant from a judgment of the general term of the superior court of the city of New

York, affirming a judgment entered upon the verdict of a jury for the plaintiff in an action to recover damages for an accident resulting in the death of the plaintiff's decedent in January, 1889.

Statement
of case.

Upon the trial of the action the evidence on the part of the plaintiff tended to show the following facts: The deceased, in company with his brother-in-law, left the saloon kept by the latter on the southwest corner of Thirty-fourth street and First avenue in the city of New York, about 12 o'clock at night on the 16th of January, 1886, and walked to a saloon kept by a friend, where they remained until between 3 and 4 o'clock. During nearly all the time they were in the latter place the deceased was asleep and his companions were playing cards. Between 3 and 4 o'clock in the morning they left the saloon, and took a train on the elevated road at Thirty-fourth street, and went to the One Hundred and Sixteenth Street station, where they arrived about half past 5 in the morning. Where they went and what they were doing between the time they left the saloon of their friend and the time they arrived at the Thirty-fourth Street station does not very clearly appear. The night in question, as testified to by the friend of the deceased, was quite cold, and from before 12 until between 3 and 4 o'clock in the morning it was snowing, or, in his language "it was sleet, not extra hard; it was a mixture of snow and hail;" and to avoid the snow and hail they passed the time in the saloon until the hour mentioned, which was Sunday morning. It was quite dangerous walking along the sidewalks, the snow and hail making it very slippery, and it was freezing considerably. The deceased and his companion got out at the One Hundred and Sixteenth Street station and went down the stairs leading to the street. When on the third step from the bottom the deceased fell, and sustained a fracture of the leg, called by the surgeon a "Potts" fracture. He was a large man, weighing about 225 pounds, and after the accident was taken to the hospital, where he remained until Wednesday morning. Delirium having in the mean time set in, he was removed to Bellevue hospital, where he died the same day. The surgeon in charge of the hospital where he was first taken stated that the delirium was, as he thought, what is known as traumatic delirium, which he stated is indistinguishable from *delirium tremens*; and there is evidence given on the part of defendant tending to show that the deceased before the accident had been drinking very freely, and that the delirium from which he died was *delirium tremens*. The brother-in-law of the deceased testified that the steps leading from the train to the street below were very slippery at the time of the accident, and that there was no evidence of any ashes or sawdust or anything of that nature having been spread upon them to prevent people from slipping, nor was there any evidence of any attempt at removing

the substance, whatever it was, which had accumulated upon the steps. The steps were enclosed the height of a hand-rail, and from the hand-rail to the roof they were open. They were covered with a roof which projected about a foot on each side of the stairway, and the hand-rail on each side could easily be grasped to aid in ascending or descending the stairs. At the end of all the evidence in the case there was a motion for a nonsuit upon the ground, among others, that there was no evidence of negligence on the part of the defendant, which was denied, and counsel for the defendant excepted.

The learned judge in his charge to the jury said, among other things, that in this case "the legal duty of the defendant was to use all human care, caution, and skill to make their ingress and egress from the station safe. They are not called upon by law to guaranty perfect safety, but they are required to use all the skill, all the diligence, all the care that the most cautious human being would use if he were looking after the protection of his own life and health." Upon exception, the latter part of the charge was modified by the court by saying "a very cautious," instead of the words "the most cautious," human being would exercise, and, as modified, counsel for the defendant duly excepted to it. In speaking of the condition of the stairway or steps at the place of accident the learned judge also said: "If you come to the conclusion that they were slippery at that time, and that means might have been taken to prevent them from being so, and that by reason of their slipperiness the plaintiff fell, as has been stated, then, gentlemen, so far as this issue goes, you will be justified in finding for the plaintiff,"—to which portion of the charge exception was duly taken by the defendant's counsel.

In response to a request to charge on the part of the defendant the court again said; "I hold that in the case of the defendant it is bound to use the utmost care in keeping its steps free from slipperiness, and free from danger on that account, as long as and while it is carrying passengers, who, in their ingress and egress from the station, are obliged to use those steps; and that in the case now before the court there is no evidence of any instantaneous or recent cause of slipperiness which would render the charge as requested necessary." An exception was duly taken to the charge as given.

The rule in relation to the liability of railroad corporations for injuries sustained by passengers under such circumstances as this case develops differs from that which obtains in the case of an injury to a passenger while he is being carried over the road of the corporation, and where the injury occurs from a defect in the road-bed, machinery, or in the construction of the cars, or where it results from a

Charge to jury.

Duty of Carrier of passengers.

defect in any of the appliances such as would be likely to occasion great danger and loss of life to those travelling on the road. The rule in the latter case requires from the carrier of passengers the exercise of the utmost care, so far as human skill and foresight can go, for the reason that a neglect of duty in such a case is likely to result in great bodily harm, and sometimes death, to those who are compelled to use that means of conveyance. As the result of the least negligence may be of so fatal a nature, the duty of vigilance on the part of the carrier requires the exercise of that amount of care and skill in order to prevent accident. See *Hegeman v. Western R. Corp.*, 13 N. Y. 9. But in the approaches to the cars, such as platforms, halls, stairways, and the like, a less degree of care is required; and for the reason that the consequences of a neglect of the highest skill and care which human foresight can attain to are naturally of a much less serious nature, the rule in such cases is that the carrier is bound simply to exercise ordinary care in view of the dangers to be apprehended. We have lately had cases of this character before us, and in the case of *Lafflin v. Buffalo & S. W. R. Co.*, 106 N. Y. 136, where a passenger was injured in stepping from a car onto the platform, because, as he alleged, the platform was too far from the steps of the car, this rule was announced (opinion per EARL, J.): "The company was not bound so to construct this platform as to make accidents to passengers using the same impossible, or to use the highest degree of diligence to make it safe, convenient, and useful. It was bound simply to exercise ordinary care, in view of the dangers attending its use, to make it reasonably adequate for the purpose to which it was devoted." In *Morris v. New York, C. & H. R. R. Co.*, 106 N. Y. 678, 455, a passenger was injured by the falling upon him of a clothes-wringer placed in a rack over his seat by another passenger; and the court held the measure of care required of a carrier of passengers in such a case was not the highest care which human vigilance could give, but that the company was only to be held to reasonable care, to be measured by the circumstances surrounding the case. In *Palmer v. Pennsylvania Co.*, 111 N. Y. 488, it was held that the rule requiring the utmost possible care in discovering defects in the trucks and running machinery of a road did not apply where a passenger was injured by slipping on a platform of a car which had become slippery on its passage during the night because of a storm which was raging during that time. It was said in that case by RUGER, C. J., that "the trial court was not justified in applying to this case the rule pertaining to the construction and maintenance of tracks and running machinery by railroad corporations, which holds them to the use of the utmost possible care in discovering and remedying defects therein. That rule is applicable to such appliances of a railroad as would be likely to occasion great danger and loss of life to the travelling public, if defects

existed therein on account of the velocity with which cars are moved, and the destructive and irresistible force which accompanies such motion." And again the learned judge said: "The presence of snow or ice upon exposed places on moving cars is an accident of the hour, and no ordinary diligence could, during the prevalence of a storm, wholly remove its effects from the places exposed to its action, so as to prevent accidents to heedless and inattentive travellers. A passenger on a railroad train has no right to assume that the effects of a continuous storm of snow, sleet, rain or hail will be immediately and effectually removed from the exposed platform of the car while making its passage between stations or the *termini* of its route, and it would be an obligation beyond a reasonable expectation of performance to require a railroad corporation to do so." See also *Unger v. Forty-second Street R. Co.*, 51 N. Y. 497.

In applying this rule of reduced liability to the case in hand, we are unable to see from the evidence on the part of the plaintiff that the defendant was guilty of such negligence as would permit the recovery of a judgment for the injury sustained by the deceased. The night was cold and stormy. Snow fell, mixed with sleet, and the sidewalks were rendered very slippery. This the deceased knew, for he walked upon them from the saloon to the Thirty-fourth Street station. The storm commenced about midnight and continued until nearly 4 o'clock in the morning, and this accident happened between half past 5 and 6 o'clock. The defendant had furnished a covered stairway, with hand-rails, and pieces of rubber on each step to prevent slipping; and the failure to throw ashes or sawdust, or something of that character, upon the steps during the storm cannot be regarded as negligence, because the continuance of the storm would soon render the steps as slippery as before; and it seems to us that culpable negligence cannot be predicted upon the failure to clean off the steps between the time the storm ceased, which was between 3 and 4 o'clock in the morning, and the time when the accident happened. So brief a period as that, at such a time in the night, cannot, we think, be regarded as any evidence of a lack of that reasonable care which the defendant was bound to exercise.

Great reliance was placed on the argument upon the case of *Weston v. New York E. R. Co.*, 73 N. Y. 595, but we think that case does not control this one. In the *Weston* case the plaintiff sustained injury by falling upon an uncovered platform between a waiting room and the defendant's cars, and over which platform it was necessary to pass to reach the cars, and which platform the defendant had negligently suffered to become covered with snow and ice, rendering passage over it insecure and dangerous. The evidence showed that during the day, and before the accident

happened it had snowed and the snow had been but partially removed from the platform. The plaintiff, while proceeding with caution, lost his footing, fell, and was injured. The evidence showed that other passengers at about the same time slipped upon the platform. There was no difficulty in making the platform safe, and the accident happened in the day-time. A verdict for the plaintiff was upheld in the court below, and sustained in this court. The court below had charged that the defendant was bound to be on the alert during cold weather, and to see whether there was ice upon the platform, and to make it safe by putting sand or ashes upon it, or in some other way. This court held that that was not too stringent a rule. This case, we think, materially differs from that one. Here there was a continuous storm of sleet and snow from about 12 to 4 o'clock, and within two or three hours after the storm ceased, and in the very early morning the accident occurred. The staircase was covered, and the roof projected a foot on each side of it. There were rubber tips on each step, and a hand-rail on either side to aid passengers in going up and down the stairs. Under such circumstances, the duty, even of alertness, on the part of the defendant was not omitted by a failure to render the stairs less slippery at such a time in the night and within the period named. We think the motion for a nonsuit should have been granted.

Again, the learned judge in his charge to the jury fell into error when he stated the obligation of the defendant upon the facts of this case. Under the cases above cited it was error to instruct the jury that it was the legal duty of the defendant to use all human care, caution and skill to make the ingress and egress to the defendant's station safe. This statement of the law was not in any manner explained or taken back. He also stated that the defendant "was required to use all the skill, and all the diligence, and all the care that the most cautious human being would use if he were looking after the protection of his own life and health." Upon exception being taken to that remark, he altered it by saying "a very cautious," instead of "the most cautious," human being. The charge in both forms was erroneous under the authorities already cited.

We think he also erred in his charge with reference to the condition of the stairs when he said: "If you come to the conclusion that they were slippery at that time, and that means might have been taken to prevent their being so, and that by reason of their slipperiness the plaintiff fell, as has been stated, then, so far as this issue goes, the jury would be justified in finding for the plaintiff." This charge practically made the company liable for the slipperiness of the steps, if by the exercise of the greatest human care and skill which human foresight could think of such condition could have been prevented. Of course such condition could have

been prevented by stationing men at each stairway, constantly engaged in sweeping and cleaning the steps; or, if one man were not enough to do it, then under this ruling others should have been employed. And under this charge, if the storm was so severe as to require it, one man on each step should have been employed. No such rigorous rule exists, in our judgment.

These views lead to a reversal of the judgment, and to the granting of a new trial, with costs to abide the event.

• All concur, except DANFORTH, J., not voting.

Station Accommodations—Safety and Sufficiency.—As a general rule, railroad companies are bound to keep in safe condition all portions of their platforms, and approaches thereto, to which the public do or would naturally resort, and all portions of their station grounds, reasonably near to the platforms where passengers taking passage on their cars would naturally or ordinarily be likely to go. *Union Pacific R. Co. v. Sue* (Neb.), 41 N. W. Rep. 801; *Green v. Pennsylvania R. Co.*, 36 Fed. Rep. 66. A person in good faith coming to the depot for the purpose of taking passage on the cars, is to be regarded as a passenger although a ticket may not have been purchased. *Grimes v. Pennsylvania R. Co.*, 36 Fed. Rep. 72. It is the duty of a railroad company within a reasonable time before the arrival and departure of trains, to properly light its waiting rooms, and the platform connected therewith so as to make them comfortable and safe for the use of passengers desiring to take passage on its trains, but it is not its duty to keep its waiting room and platform lighted in the night time at unreasonable hours, although it is its duty to keep the platform in its construction in a safe condition as to persons who might lawfully go upon it, at all times. *Grimes v. Pennsylvania R. Co.*, 36 Fed. Rep. 72.

An instruction that a railroad company owes a much higher degree of care to passengers than it does to the public generally, going upon its tracks at public crossings, taken in connection with the other instructions given to the jury was held to be correct. *Union Pacific R. Co. v. Sue* (Neb.), 41 N. W. Rep. 801. In that case it was also held that where a railroad company receives its passengers from a space between parallel tracks, it is bound to provide such safeguards as will protect such passengers in the exercise of ordinary care from injury from passing trains; and if it fail to do this, whether its negligence consists in its failure to provide a proper platform, or to notify passengers who have gone between its tracks to enter its cars, of the approach of a train on a track parallel and near to that on which its passenger train is standing, and an injury results from such failure to one of the passengers who is about to enter its car, and without negligence on the part of such passenger, the railroad company will be liable for the damage resulting from such injury.

If a pathway is the means usually employed by persons going to and from a railroad station, it is the duty of the railroad company to guard against injury to persons passing that way, and it will be liable for injuries caused through falling into an unguarded hole in such pathway. *Green v. Pennsylvania R. Co.*, 36 Fed. Rep. 66.

If a passenger who has alighted from a train, instead of using the usual and proper means of egress from the station, walks along the railroad track and is injured by falling into a cattle guard, the company is not liable to him for the injuries so sustained. *Sturgis v. Detroit, Grand Haven & Milwaukee R. Co.* (Mich.), 40 N. W. Rep. 914.

DODGE

v.

BOSTON AND BANGOR S. S. CO.

(Massachusetts Supreme Judicial Court, January 3, 1889.)

Passengers—Personal Injuries—Duty of Company—Landing at Wharf.—In an action to recover damages for personal injuries, it appeared that the plaintiff was a passenger upon a steamboat belonging to the defendant; that meals were served on board to such passengers as chose to pay for them or whose tickets entitled them thereto; that the plaintiff's ticket did not entitle him to meals; that he attempted to land for the purpose of obtaining breakfast at a wharf where the boat was accustomed to remain a considerable time; and that it was the custom of many passengers to do so at that place. *Held*, that the plaintiff, as a passenger could properly go on shore to get his breakfast, and that he had a passenger's right to protection during his egress from the steamer.

Same—Duty of Company—Degree of Care.—Whilst a passenger on board a steamboat is attempting to land at a place where he may properly do so, the degree of care to be used by the company for his protection is the highest which can be exercised by it in that particular instance.

Same—Disregard of Regulations.—In an action to recover damages for personal injuries, when it appears that the defendant company had provided a safe and convenient place for passengers to land from the saloon deck of the steamboat and gave notice thereof to the passengers aboard; and that the place where plaintiff was injured was not intended for use by passengers, the plaintiff must, by disregarding the regulations of the company, be held to have taken all the risk of injury upon himself in leaving at the time and place and in the manner in which he did.

ON exceptions from Superior Court, Essex County.

Action against the Boston & Bangor S. S. Co. to recover damages for personal injuries sustained by Wm. C. Dodge, a passenger upon one of the defendant's steamboats, who was injured whilst attempting to land therefrom. Plaintiff was a passenger on board the steamboat running from Boston to Camden which was accustomed to stop at Rockland from forty minutes to two hours for receiving and discharging freight and passengers. Many of the passengers were accustomed to go ashore at Rockland for the purpose of having breakfast although meals were served on board. On the arrival of the steamboat at Rockland, the plaintiff attempted to land by a small plank placed from the forward gangway of the main deck to the dock, when he was struck by a heavy gang plank and injured. While the boat was approaching Rockland, notice had been given in all places where passengers were expected, to land from the saloon deck. Plaintiff testified that he had not heard such notice as he landed at Rockland although he had heard it at other places. On behalf of

Facts.

the defendant, testimony was introduced to the effect that the mate warned the plaintiff not to cross the gangway on the main deck, and informing him that the proper place to land was from the saloon deck. There was also evidence to the effect that after the accident, plaintiff had said that he had been hurt by his own fault. The following instructions were requested by the defendant but refused :

“(1.) The defendant was not bound to take every possible precaution against danger. It was not an insurer of the safety of the plaintiff. It was bound to use the utmost care which was consistent with the nature and extent of the business in which it was engaged, but was bound to exercise this degree of care towards the plaintiff only so long as the plaintiff remained upon or within the steamer. (2.) The defendant was bound to guard the plaintiff against all such dangers only as might naturally and according to the usual course of things be expected to occur; and this, too, only as long as plaintiff remained upon or within the steamer. (3.) Upon the undisputed facts of this case, the plaintiff, at the time of receiving the injury of which he complains, was a passenger. He was entitled to the rights and protection of a passenger only so long as he remained within or upon the steamer. (4.) Upon the undisputed facts of this case, the undertaking and duty of the defendant towards the plaintiff was to carry him with the highest degree of care from Boston to Camden, and only at Camden to provide him safe means to leave the steamer. (5.) Defendant was not bound to prevent plaintiff from leaving or attempting to leave the steamer at a place where it had not invited him to leave, or undertaken any contract to land him. (6.) If the jury find that the plaintiff undertook, for his own convenience or pleasure, to leave the steamer at Rockland, an intermediate station on the trip for which he had purchased his ticket, while the steamer was temporarily at said Rockland for the purpose of discharging and receiving other passengers, baggage, and freight at said Rockland, and without notice to any of the officers or servants of the defendant that he desired to leave the steamer at that point, and without any invitation from the officers or servants of defendant to leave the steamer at said point, at the time and in the manner in which he left the steamer, then the defendant was under no obligation to furnish the plaintiff with safe means of egress from the steamer at that point. (7.) If the jury shall find that the plaintiff left the defendant's steamer at a point short of his destination, without any invitation or inducement from the defendant or its agents or servants, and solely for his own purposes and convenience, he was, after leaving the steamer, a mere trespasser upon the defendant's landing and wharf, and the only obligation upon the defendant was not to wilfully injure him. (8.) If the jury shall find that the plaintiff was warned by

the agents or servants of the defendant not to leave the steamer at the forward port gangway on the main deck at or before the time at which he left it, the plaintiff must be held to have taken all the risk of injury himself, in leaving at the time, and in the manner in which, and portion of the steamer at which, he left the steamer, and cannot recover from the defendant for any injury which he may have sustained while so leaving, unless such injury was wilfully inflicted. (9.) If the jury shall find that the plaintiff was notified by the agents or servants of the defendant at or before the time at which he left the steamer that passengers desiring to land at Rockland were to land at or from a part of said steamer other than the forward port gangway on the main-deck, from which the plaintiff did actually land, the plaintiff must be held to have taken all the risk of injury himself, in leaving the steamer at the time, and in the manner in which, and portion of the steamer at which, he left the steamer, and cannot recover from the defendant for any injury which he may have sustained while so leaving, unless such injury was wilfully inflicted." And the defendant further requested the court, in case of refusal to give the instruction requested, marked No. 6, above, to give the following: "(10.) Even if the plaintiff was justified in leaving the steamer at Rockland, in the manner, and at the time, and in the portion of the steamer at which he left it, the defendant did not owe him so high a degree of care, after he had left the steamer, and was out upon the slip, as it owed him while he remained upon or within the steamer." Defendant brings exceptions to review a verdict for the plaintiff for \$2,500.

E. T. Burley and Edward S. Dodge for defendant.

Moody & Bartlett for plaintiff.

KNOWLTON, J.—This case presents an important question as to the rights and duties of passengers and common carriers, in reference to egress from and ingress to the vehicle of transportation at intermediate points upon a journey. When one has made a contract for passage upon a vehicle of a common carrier and has presented himself at the proper place **Passengers** to be transported, his right to care and protection be- **Duty of** gins, and ordinarily it continues until he has arrived at **carrier.** his destination and reached the point where the carrier is accustomed to receive and discharge passengers. So long as he stands strictly in this relation of a passenger, the carrier is held to the highest degree of care for his safety. While he is upon the premises of the carrier, before he has reached the place designed for use by passengers waiting to be carried, or put himself in readiness for the performance of the contract, the carrier owes him the duty of ordinary care, as he is a person rightfully there by invitation. It has sometimes been said that a passenger

at the end of his journey retains the same relation to the carrier until he has left the carrier's premises. But there are other cases which indicate that the contract of carriage is performed when the passenger, at the end of his journey, has reached a safe and proper place, where persons seeking to become passengers are regularly received, and passengers are regularly discharged; and that the degree of care to which he is then entitled is less than during the continuance of his contract, as the liability of a carrier for goods is held less strictly after they have reached their destination and been put in a freight house than while they are in transit.

There is sometimes occasion to leave the boat, or car, or carriage, and return to it again before the contract is fully performed; and it is necessary to determine what are the rights and duties of the parties at such a time. Whenever performance of the contract in a usual and proper way necessarily involves leaving a vehicle and returning to it, a passenger is entitled to protection as such, as well while so leaving and returning as at any other time. And this has been held in cases where, in accordance with arrangements of the railroad companies, passengers by railway left their train to obtain refreshments. *Peniston v. Chicago, St. L. & N. O. R. Co.*, 34 La. Ann. 777; *Jeffersonville, M. & I. R. Co. v. Riley*, 39 Ind. 568. So where a railroad company undertakes to carry a passenger a long distance upon its line, and sells him a ticket upon which he may stop at intermediate stations, in getting on and off the train at any station where he chooses to stop, he has the rights of a passenger. Of course, during the interval between his departure from the station and his return to it to resume his journey he is not a passenger.

To determine the rights of the parties in every case, the question to be answered is, what shall they be deemed to have contemplated by their contract? The passenger may do, without losing his rights, while he is in those places to which the carrier's care should extend, whatever is naturally and ordinarily incidental to his passage. If there are telegraph offices at stations along a railroad, and the carrier furnishes in its cars blanks upon which to write telegraphic messages, and stops its trains at stations long enough to enable passengers conveniently to send such messages, a purchaser of a ticket over the railroad has a right to suppose that his contract permits him to leave his car at a station for the purpose of sending a telegraphic message; and he has the rights of a passenger while alighting from the train for that purpose, and while getting upon it to resume his journey. So of one who leaves a train to obtain refreshment where it is reasonable and proper for him to do so and is consistent with the safe continuance of his journey in a usual way. Where one engages transportation for himself by a conveyance which stops from time to time along his route, it may well be implied, in the absence of anything

to the contrary, that he has permission to alight for his own convenience at any regular stopping place for passengers, so long as he properly regards all the carrier's rules and regulations, and provided that his doing so does not interfere with the carrier in the performance of his duties. In the case of *Packet Co. v. True*, 88 Ill. 608, a plaintiff, before reaching his destination, was going ashore for his own convenience at a place where the boat stopped two hours, and was injured on the gangway plank. It was held that he was to be treated as a passenger, and that the defendant was bound to use the utmost care for his safety. See also *Clussman v. Long Island R. Co.*, 9 Hun 618, affirmed in 73 N. Y. 606; *Herbrick v. Carr*, 29 Fed. Rep. 298; *Dice v. Transportation Co.*, 8 Or. 60. In the first of these cases the defendant was held liable for a defect in a platform of its station to a passenger who had left a train to send a telegraphic message; but the court did not decide whether the plaintiff had the rights of a passenger at the time of his injury or merely those of a person there by invitation. In the second, a passenger who had taken his place on board a steamship started to go on shore to buy some tobacco, and fell from an unsafe plank and was drowned. He was held to have had the rights of a passenger, and his administrator was permitted to recover. No decision has been cited that conflicts with our views. In *State v. Grand Trunk R. of Can.*, 58 Me. 176, the circumstances under which the passenger left the train and remained away from it were such that, applying the principles we have enunciated, he was not a passenger at the time he was killed. The court in that case was not called upon to consider at what point a passenger leaving a car under different circumstances would cease to be such and at what point he would resume his former relation. Upon the undisputed facts of the case at bar, we are of opinion that the plaintiff, as a passenger, could probably go on shore to get his breakfast at Rockland, and that he had a passenger's right to protection during his egress from the steamer. The first seven of the defendant's requests for instructions were rightly refused.

The defendant's tenth request was for an instruction that, if the plaintiff was justified in leaving the steamer as he did, the "defendant did not owe him so high a degree of care after he had left the steamer and was out upon the slip as it owed him while he remained upon or within the steamer." This request referred to the degree of care which the law requires of carriers of passengers as distinguished from the ordinary care required of men in their common relations to each other. Because a passenger's life and safety are necessarily entrusted in a great degree to the care of the carrier who transports him, the law deems it reasonable that the carrier should be bound to exercise the utmost care and diligence in pro-

Degree
of care.

viding against those injuries which human care and foresight can guard against. This rule is held not only in our own state and in England, but all over the United States. It applies not only to carriers who use steam railroads, but to those who use horse railroads, stage coaches, steamboats and sailing vessels. It applies at all times when, and in all places where, the parties are in the relation to each other of passenger and carrier; and it includes attention to all matters which pertain to the business of carrying the passenger. In *Readhead v. Midland R. Co.*, L. R., 2 Q. B. 412, it is said that a "carrier of passengers for hire is bound to use the utmost care, skill and diligence in everything that concerns the safety of passengers." In *Railroad Co. v. Aspell*, 23 Pa. St. 147, carriers of passengers are said to be responsible for "any species of negligence, however slight, which they or their agents may be guilty of." In *Warren v. Fitchburg R. Co.*, 8 Allen (Mass.) 227, the principle was applied to providing for a passenger a safe and convenient way and manner of access to the train. In *Simmons v. Steamboat Co.*, 97 Mass. 361, it was applied to the duty of a carrier to protect passengers from the misconduct or negligence of other passengers. *Gaynor v. Railway Co.*, 100 Mass. 208, was a case where it appeared that the defendant did not provide proper safeguards against injury for a passenger leaving the place where he alighted from the cars. Mr. Justice COLT said in the opinion: "The plaintiff was a passenger, and while that relation existed the defendants were bound to exercise towards him the utmost care and diligence in providing against those injuries which can be avoided by human foresight. He was entitled to this protection so long as he conformed to the reasonable regulations of the company, not only while in the cars, but while upon the premises of the defendants; and this requires of the defendants due regard for the safety of passengers, as well in the location, construction and arrangement of their station buildings, platforms and means of egress, as in their previous transportation." See also language of Chief Justice SHAW, in *McElroy v. Railroad Corp.*, 4 Cush. 400. Difficulty in the application of this rule has sometimes come from an improper interpretation of the expressions "utmost care and diligence," "most exact care," and the like. These do not mean the utmost care and diligence which men are capable of exercising. They mean the utmost care consistent with the nature of the carrier's undertaking, and with a due regard for all the other matters which ought to be considered in conducting the business. Among these are the speed which is desirable, the prices which passengers can afford to pay, the necessary cost of different devices and provisions for safety, and the relative risk of injury from different possible causes of it.

With this interpretation of the rule the application of it is

easy. As applied to every detail the rule is the same. The degree of care to be used is the highest; that is, in reference to each particular it is the highest which can be exercised in that particular, with a reasonable regard to the nature of the undertaking and the requirements of the business in all other particulars. *Warren v. Fitchburg R. Co.*, *ubi supra*; *Le Barron v. Ferry Co.*, 11 Allen 315; *Taylor v. Grand Trunk R. Co.*, 48 N. H. 304-316; *Tuller v. Talbot*, 23 Ill. 357. It may be assumed that the plaintiff would have ceased for the time to be a passenger if he had left the steamer and gone away for his breakfast. But he was injured before he had completed his exit. Inasmuch as he had a passenger's right of egress, this request for an instruction was rightly refused; for, while he was a passenger, the degree of care to be exercised towards him did not depend upon whether he was on the steamer, or on the plank, or the slip. It was the same in either place. But, in determining what is the utmost care and diligence within the meaning of this rule, it is always necessary to consider what is reasonable under the circumstances. The decision in *Moreland v. Boston & P. R. Co.*, 141 Mass. 31, was made to rest upon the inaccuracy of the instructions as to the degree of care required of passengers, and it is not an authority for the defendant in the present case.

In its eighth request the defendant asked for an instruction as to the rights of a passenger acting in disobedience of an order or regulation of a carrier. The evidence was undisputed that the defendant had provided a safe and convenient place for passengers to land from the saloon deck, and that the place where the plaintiff was injured was not intended for use by passengers. The judge said in his charge: "The plaintiff does not now claim that the defendant did not furnish proper means of egress from the saloon deck, nor do I understand that the plaintiff now claims that the defendant intended the gangway which was in fact used by the plaintiff for use by passengers leaving the boat." We must therefore assume that the court and the parties treated these matters as undisputed facts of the case; and upon these facts, a warning to the plaintiff not to leave the steamer from the gangway by which he went was a reasonable order or regulation. A passenger is bound to obey all reasonable rules and orders of a carrier in reference to the business. The carrier may assume that he will obey, and the carrier owes him no duty to provide for his safety in acting in disobedience. His neglect of his duty in disobeying, in the absence of a good reason for it, will prevent his recovery for an injury growing out of it. This request, as applied to the admitted facts of the case, and to a fact which the jury might have found from the evidence, contained a correct statement of the law (*Ellis v. Steamship Co.*, 111 Mass. 146; *Railroad*

Disobedience
to regula-
tion of
carrier.

Co. v. Zebe, 33 Pa. St. 318; McDonald v. Chicago & N. W. R. Co., 26 Iowa 124-142; Gleason v. Transportation Co., 32 Wis. 85;) and we are of opinion that the jury should have been instructed in accordance with it. It was not a request for an instruction merely as to the effect of a part of the evidence upon a particular subject. It was rather a request for a statement of the law applicable to one phase of the case, which involved a consideration of all the evidence relative to that phase of it. And if, by the word "notified" in the ninth request, was meant the giving of a notification intelligibly, so as to make it understood by the plaintiff, the same considerations apply also to that request.

No instructions were given upon this subject, and because of this error the entry must be, exceptions sustained.

HUNTER AND ANOTHER

v.

COOPERSTOWN & SUSQUEHANNA VALLEY R. CO.,

(*New York Court of Appeals, February 8, 1889.*)

Passenger—Attempt to Board Moving Train—Contributory Negligence.—A person acting upon the direction of the conductor, attempted to board a moving train at a station where the train was advertised to stop, but was thrown from the steps of the platform and killed. The train was moving at a rate of at least six miles an hour. *Held*, that, notwithstanding the fact that the deceased made the attempt in obedience to the conductor's direction, he was guilty of contributory negligence, and the plaintiff ought to be non-suited. DANFORTH, J., dissenting.

APPEAL from General Term of the Supreme Court, Fourth Department.

Action against the Cooperstown & Susquehanna Valley R. Co., by Delora M. Hunter and another, as administrators, to recover damages for negligently causing the death of the plaintiff's intestate. The defendant appeals from the judgment of the general term, affirming a judgment for the plaintiff.

E. M. Harris for appellant.

James A. Lynes for respondents.

PECKHAM, J.—Accepting the facts as testified to on the part of the plaintiff in this action, it appears that on the 25th day of September, 1884, the plaintiff's decedent came to the station of the defendant called "Phoenix Mills," in the early morning, for

the purpose of taking a train to the neighboring village of Oneonta. There was a platform in front of the station, the northern end of which was used for freight, and was Facts. two or three feet higher than the southern end, which was used more especially for passengers. The passenger portion of the platform was only about one foot above the ground, and communication between the upper and lower platforms was had by steps leading from one to the other. The top of the freight platform was four and one-half feet higher than the rails of the defendant's road. At the north end of the freight platform the distance between it and a car, as it would pass along the track, would be six inches. At the center of the freight platform it would be four inches, and the same distance at the south end.

The plaintiffs' decedent, upon hearing the whistle of a train approaching from the north on its way towards Oneonta, got up and stood on the passenger portion of the platform, awaiting its arrival; and, when it had got within a short distance of the station, the conductor came out onto the platform of the rear passenger car, and asked plaintiffs' decedent if he was going, and added: "If you are, jump on."

There were but two witnesses sworn on the part of the plaintiff in regard to the rate at which the train was moving when this direction was given by the conductor. One of them says the train was moving at that time six or eight miles an hour: the other, who was the engineer of the train, stated that it was going from four to six miles an hour. When the conductor directed the deceased to jump on, he was standing on the passenger platform three or four feet north of the steps connecting with the freight platform, and he started to jump on the front platform of the passenger car while it was thus in motion. He was caught in some shape, as the witnesses say, without being able to describe exactly how, and rolled along the station platform with his head and shoulders above it. His body was caught about the hips. The train was stopped, and he was taken out, and died within a short time.

From this evidence it is quite plain that the train was in comparatively rapid motion at the time when the deceased made his attempt to board it. I say comparatively rapid motion, meaning by that a motion that was rapid, when taking into consideration that a man was attempting to board it. There can be no doubt from this evidence that the train was moving at least six miles an hour. The engineer fixes it from four to six; and being a witness for the plaintiff, and not in the defendant's employ at the time he was sworn, it may be assumed that he did not put the speed any greater than in fact it was.

The deceased was a man in the full vigor of life, presumably of ordinary judgment, at least up to the average of mankind, and he

was at a familiar station, and about to take a train to go to a neighboring village a few miles distant. It was the duty of the railroad company (having advertised so to do) to stop its trains at the station in question, and to give ample time to all persons desirous of getting on or leaving trains at that station to do so.

The important question which arises is, does a man who is *sui juris*, and in the full possession of his faculties, with nothing to disturb his judgment, act with ordinary care in endeavoring to board a train moving at the rate of six miles an hour? It seems to me there can be but one answer to such a question. That it is a dangerous—a most hazardous—attempt must be the common judgment of all men. Persons are taught from their earliest youth the great danger attending upon an attempt to board or leave a train while it is in motion, and no person of mature years and judgment but has the knowledge that such an attempt is dangerous in the highest degree. It is substantially admitted in this case that it would have been negligence on the part of the deceased to have made the attempt, had it not been for the request or what is termed the direction of the conductor to him to get on. It may be assumed that this direction implied a notice to the deceased that the train would not stop at that station, and that unless he attempted to get on while the car was thus in motion he would be left at the station, and compelled to take another and a later train. It may be assumed that in giving this direction, and in failing to stop the train, the company was chargeable with negligence, and yet it counts for nothing as a justification or excuse for the conduct of the deceased in attempting to board a train while thus in motion.

There may undoubtedly be circumstances under which an attempt to get on or off a moving train would not be regarded as negligence, as matter of law, and where the question of negligence, under all the circumstances of the case, should be submitted to the jury. One such case was that of *Filer v. New York Cent. R. Co.*, 49 N. Y. 47. There the plaintiff received the injuries complained of in attempting to get off the cars while they were in motion, making very slow progress. The plaintiff, who was a woman, was directed by the brakeman on the car to get off, and there was evidence upon which the jury might have found that she was told by him that they would not stop or move more slowly to enable her to do so. The name of the station had been called, and the speed of the train had been greatly reduced, so much so that baggage had been taken from the baggage car, and removed by the porter, and one man, who was supposed to be a little lame, had gotten off safely. ALLEN, J., in delivering the opinion of this court, said: "She was put to her choice without any fault of hers whether to obey the advice and suggestion of the defendant's servant, and

follow the example of the man who had preceded her, or to remain on the cars, and be carried beyond the place of her destination, and away from her friends; and it was a proper question for the jury whether this was or was not, under the circumstances, an act of ordinary care and prudence." The learned judge, continuing, said: "Had the cars been going at a rapid rate, the plaintiff must have known that she would be injured in leaping from them; and the attempt to leave the cars under such circumstances, even at the instance of a railway servant, would have been a wanton and reckless act, and no recovery could be had against the defendant."

In *Morrison v. Erie R. Co.*, 56 N. Y. 302, it was held that the question whether a person has been guilty of contributory negligence in attempting to alight from a car while it is in motion is not in every case a question of fact for a jury; that, when the facts are undisputed, the question of contributory negligence may become one of law. In that case the plaintiff, suing by guardian, was about 12 years of age, and the train when it approached the station slowed up. It had passed the platform, and while still in motion the plaintiff's father took her under his arm, and stepped from the car, and fell, and she was injured. FOLGER, J., delivering the opinion of the court said: "Can it be said that a person of ordinary prudence and care would have swung himself from a car in motion down to the ground in the dark, laden with the weight of a child 2 years old, having but one hand and one arm to aid himself with, when there was no other danger to be avoided by meeting this, and no incentive to the act other than the inconvenience of being carried by his place of abode, and with a full apprehension of the danger he was about to run? I think not, and I am of the opinion that it is so clear that the law and the court should have given the answer without calling in the aid of a jury." See also *Phillips v. Rensselaer & S. R. Co.*, 49 N. Y. 177; *Soloman v. Manhattan R. Co.*, 103 N. Y. 437.

In the last cited case ANDREWS, J., says: "Negligence, no doubt, is usually a question of fact of which the jury must enquire; but the inference of negligence in a given case may be so clear and convincing that the judge may direct a verdict. The conclusion that it is *prima facie* dangerous to alight from a moving train is founded on our general knowledge and common experience, and it is akin to the conclusion now generally accepted that it is in law a dangerous, and therefore a negligent, act, unless explained and justified by special circumstances, to attempt to cross a railroad track without looking for approaching trains. In boarding a moving train there is generally less excuse than in alighting from one. The party attempting it is not often under the same stress of circumstances as frequently happens in the former case. He may be compelled to wait for another train, but this is an inconvenience merely, which does not justify exposing himself to hazard. * * *

If men will take hazards, they must bear the consequences of their own rashness, and it is no just reason for visiting the consequences upon another that his negligence co-operated in producing the result."

We think that the facts in this case are so overwhelming in their nature that no reasonable judgment can be formed as to the act of the deceased in attempting to jump upon this moving train other than that it was dangerous and reckless, and that the injury resulting therefrom was contributed to by him. We do not regard it as of the slightest importance, under the circumstances of this case, that the conductor of the train notified the deceased to jump on. That notification certainly cannot be interpreted to mean more than that the train would not stop or go slower than it was then going, and that if the deceased wanted to take it he must jump on at that moment. That does not alter the highly dangerous nature of the act itself. The deceased was in absolute safety at the time the direction was given. It created no emergency which called for the exercise of immediate judgment in the choice between the two dangers. It was a simple question of possible inconvenience of taking a later train, or reaching his destination by some other conveyance, and it afforded not the slightest justification or excuse for attempting to board a train moving at that rate of speed, and when he did it he did it at his own risk. We think the plaintiff, upon this state of facts, should have been non-suited.

For these reasons the judgments of the courts below should be reversed, and a new trial granted, costs to abide the event.

All concur, except DANFORTH, J., who reads for affirmance.

DANFORTH, J. (*dissenting*).—It is not suggested by the appellant that there was any misdirection by the trial judge, nor but that the defendants were guilty of negligence in not stopping their train. The appeal rests upon the single proposition that the attempt of the plaintiff's intestate to get upon the moving train was an act of negligence contributing to his injury, and therefore sufficient as matter of law to defeat a recovery. On the contrary it seems to me that it was merely one act among others in the case, and to be considered with all the attendant circumstances. It may derive its explanation from the conduct of the defendants, and it was therefore for the jury to say how far the decedent was influenced by them upon the occasion of the accident. *Bucher v. New York Cent. R. Co.*, 98 N. Y. 128; *Filer v. New York Cent. R. Co.*, 49 N. Y. 47; *Glushing v. Sharp*, 96 N. Y. 676. And if they found that the conditions which led him into danger were of the defendant's own creation, both common sense and justice forbid that they should be allowed to withhold compensation. If,

on the other hand, the danger, notwithstanding the solicitation of the conductor, was so manifest that in the exercise of ordinary prudence the intestate should have observed it, or if observing it he went recklessly to the car, he should suffer the consequences of an injury brought on by himself. Many circumstances are to be taken into account in answering these questions, and if inferences are to be drawn, not all one way, then no tribunal save a jury is authorized to pass upon them.

The appellant relies upon the single fact that the train was in motion. That, as appears from the case referred to, is not enough to exonerate the defendants. Those decisions show that an intending passenger may attempt to board a moving train, and if injured in doing so may still recover; that is, the act is not negligent of itself. The speed of the train is in all cases to be considered, but this in connection with the conduct of the train servants, and the age and activity of the traveller, before his action upon the occasion in question can be characterized. *Eppendorf v. Railroad*, 69 N. Y. 195; *Filer v. same*, *supra*; *Burrows v. Erie Co.*, 63 N. Y. 556; *Hickey v. Railroad*, 14 Allen 429.

It is of the greatest importance, therefore, to ascertain the speed of the train. What was it? No exact testimony was given. But the train left Cooperstown at the usual time. The run to Phoenix was two and one-half or three miles only, and at Cooperstown the engineer shut off steam, and the train ran north to Phoenix, a distance of only two and one-half or three miles, without steam. It was a regular passenger station, where all trains were advertised to stop. The conductor intended to stop at that station, and was trying to do so. At about 80 rods distant the whistle was blown for the station, and the brakes applied continually until the train in fact came to a standstill, a short distance beyond the platform, 20 or 30 feet, or, as one witness says, 50 feet, and would have stopped sooner, or at the station, except that there was only one brakeman, and his brakes were defective. All that time the conductor stood upon the platform. In that position, and while eight or ten rods distant, he leaned out by the side of the car looking forward, and saw Hunter upon the station platform, facing the incoming train, and evidently waiting for it. When within eight or ten feet the conductor said to him: "Are you going? If you are, jump on." He reached out his hand and foot, tried to get on the car, and in some way was caught and killed. These are circumstances about which there is no doubt,—the engine moving without steam; the conductor intending to stop at the station; the whistle blown for the station as notice of that intention; the brakes applied; the train actually slowing up; and the conductor, expecting a passenger, calling him to get on. The effort was made to do so, and, it failing, the train was actually stopped within a few feet from the place where the accident occurred. Do not

these circumstances all tend to show, and permit the inference, that the train was moving very slowly? There was the intention to stop; the conductor's expectation to take his passenger; and the actual stoppage of the train when the accident occurred. But the opinions of witnesses are referred to as showing contrary. In view of the circumstances I have exhibited, those opinions may be taken with many grains of allowance. One witness says: "I should think the train was going about six or eight miles an hour." He was a by-stander. His attention was not called to the speed of the train at the time in question; but he was the plaintiff's witness, and his evidence is in the case for what it is worth. What is it worth? About six or about eight,—at once a difference of two miles. The engineer says: "At the time the train passed the station I should say it was going from four to six miles an hour." Wicks, the fireman, testifies: "I would say from four to six miles an hour, slacking all the while." The phrase used by all the witnesses in expressing an opinion is in the highest degree indefinite and their testimony must be weighed in view of the circumstances to which I have alluded. The rate of speed was to be determined as a fact. No witness spoke from accurate information but gave his opinion merely, the conductor not testifying to it. Observers are competent witnesses, but few are able to say with even tolerable accuracy the rate of speed at which a train at any given moment is moving. In this case their attention was not directed to it, and the weight of their testimony was to be determined. The court cannot say from it that the train was as a fact moving at a given rate. A jury might say the speed was less than four miles an hour,—as much less as the circumstances alluded to might indicate to them, and not necessarily faster than one might walk. The deceased was a young man, so far as appears, with the active habits of that age. He stood upon the platform of the station, mentally prepared to take the train, with every reason to expect that it would stop as usual. It cannot be said as matter of law that a man of ordinary prudence would not have yielded to the direction of the conductor, nor can it be said that to him, in view of the circumstances, the train was moving at a palpably dangerous rate. He did not attempt to board the train by reason of his own impatience, but upon the invitation of the defendant's servant. It is to be considered whether this direction of the conductor was not only a practical expression of his belief that the step might be taken in safety, but also as a strong expression of his opinion that the movement of the train was slow and within the bounds of safety. All these things might properly lead a jury to the reasonable belief that to the decedent the train did appear to be moving slowly, and, moreover, that it was in fact brought to such a point as only prevented complete inertness or stoppage,—a resource of engineers to avoid the necessity of overcoming the

vis inertia of a heavy train at rest. At any rate the defendant ought not to be permitted to assert that the intestate did not exercise what now it seems would have been better judgment in the condition in which he was placed by their acts. That he did not act prudently should not be adjudged as matter of law, nor to what extent his action was governed by what he might reasonably infer from that of the conductor.

The questions were for the jury and were properly submitted to them. I think the judgment which followed their verdict should be affirmed.

Boarding Moving Train.—Attempting to board a moving train, without the advice and direction of the railroad company's agents, is negligence which will preclude an injured person from maintaining an action. *Missouri Pacific R. Co. v. Texas & Pac. R. Co.*, 36 Fed. Rep. 879.

Same—Contributory Negligence—Direction of Conductor.—A passenger train having failed to stop at a flag station in response to plaintiff's signal, the conductor seized a coat that was upon plaintiff's arm and told plaintiff to jump on. In attempting to do so, plaintiff was injured. In his testimony, the plaintiff declared that he had no knowledge of the speed at which the train was running and thought that he could safely board it. There was evidence to the effect that the train was running six or eight miles an hour. *Held*, that the question of plaintiff's right to recover having been submitted to the jury, the court would not on appeal set aside a verdict in his favor on the ground of contributory negligence. *Kansas & Gulf Shore Line R. Co. v. Dorrough (Tex.)*, 10 S. W. Rep. 711.

Same—Crossing Tracks.—Passengers crossing a railroad track at a station, in order to leave or board a train halted for that purpose, are not held to the exercise of the same care and diligence which are ordinarily exacted from persons crossing tracks, but are authorized to assume that the railroad corporation will so order its trains that he will be safe from harm on the track, which he is thus invited and required to cross in order to secure his passage. But where a person attempts to board a train while moving, and after it has left the station, he no longer acts on the invitation, or stands under the protection, of the company, and while crossing or occupying the track, is bound to use proper care for his own protection. *Weeks v. New Orleans, Spanish Fort & Lake R. Co. (La.)*, 5 S. Rep. 72.

Same—Statement of Conductor.—A passenger upon a train enquired of a conductor how long the train would stop at an intermediate station. The conductor replied about five minutes. The train did not remain so long and the plaintiff in attempting to board it after it had started was injured. *Held*, that as the plaintiff had not indicated any desire to remain at the station for the period stated and the conductor had not agreed to detain the train during that time, the mere answer of the conductor to the plaintiff's question created no obligation upon the company and could have no effect upon the plaintiff's claim for damages. *Missouri Pac. R. Co. v. Foreman (Tex.)*, 11 S. W. Rep. 326.

Same—Presumption of Contributory Negligence.—When plaintiff's evidence in an action for personal injuries creates a presumption of negligence, he must rebut the presumption by evidence sufficient to produce a belief in the minds of the jury that negligence on his part did not in fact exist. *Missouri Pac. R. Co. v. Foreman (Tex.)*, 11 S. W. Rep. 326.

Assuming Dangerous Position or Doing Dangerous Act at Bidding of Conductor—See *Louisville & N. R. Co. v. Kelley*, and note 13 Am. & Eng. R. R. Cas. 1, 5; *Little Rock & F. S. R. Co. v. Miles*, and note 13 Am. & Eng. R. R. Cas. 10, 28; *Lindsey v. Chicago, R. I. & P. R. Co.*, and note 18 Am. & Eng. R. R. Cas. 179, 182; *Baltimore & O. R. Co. v. Leapley*, 27 Am. & Eng. R. R. Cas. 167.

Alighting by Direction of Conductor.—See note 31 Am. & Eng. R. R. Cas. 53.

MISSOURI PACIFIC R. CO. AND ANOTHER

v.

WORTHAM.

(Texas Supreme Court, February 12, 1889.)

Passenger—Alighting—Duty of Company.—A railroad company is bound to furnish to its passengers the safest appliances for alighting from its cars that are known and have been tested, and it cannot be held as a matter of law that this duty has been fulfilled by furnishing a box about eleven inches square on the top and somewhat larger at the bottom when, from the evidence, it appears that a passenger whilst alighting from a train, might, by stepping on the edge of the box, overturn it.

Same—Assistance to Passengers.—Where a box such as above described is used, it is the duty of the railroad company to render such assistance to passengers alighting as will make the use of the box at least as safe as a platform would have been, and the fact that such boxes had been in general use for years does not affect the question of the defendant's liability.

Same—Use of Stepping Stool—Instruction.—An instruction requested by the defendant that the jury will find for the defendant if they believe from the evidence that the stepping stool or box used for passengers to alight, at the time plaintiff was injured, was a reasonably safe appliance for the purpose and was properly placed upon ground sufficiently smooth or even so as to prevent it from turning or tilting by the use of due care on the part of passengers, is properly modified by stating that the defendant must in addition have been guilty of no negligence in using it.

APPEAL from District Court, Houston County.

Action against the Missouri Pacific R. Co. and International & Great Northern R. Co. to recover damages for injuries received by plaintiff in alighting from a train. The defendants appeal from a judgment for the plaintiff.

Burnett & Hays for appellants.

Nunn & Denny for appellee.

GAINES, J.—This was an action brought in the court below by appellee against the Missouri Pacific Railway Company and the International & Great Northern Railroad Company to

Facts. recover damages for a personal injury alleged to have been received by the appellee in descending from a car of the appellant companies. The injury is alleged to have occurred by reason of the negligent failure of appellants to provide safe means for her descent. The undisputed facts are that appellee and her daughter purchased tickets at San Antonio, and took passage on appellants' train from that point to Crockett. At

Taylor it became necessary to change cars. On approaching the last named place, the car upon which they were travelling stopped at the regular stopping place but at a point where there was no platform. A stool in the shape of a box, about 11 inches square on the top and somewhat larger at the bottom, and constructed for the purpose, was placed upon the ground in front of the car steps to aid passengers in alighting. The appellee left the car after it had reached the station, but in descending she fell and received the injury of which she complains. There can be but little doubt that the box overturned with her as she stepped upon it. As to the circumstances attending the accident the testimony was conflicting. The appellee, her daughter and another passenger deposed that she was not assisted in descending from the car by anyone. The conductor, the brakeman, and porter on the train testified that they saw the accident, and that the brakemen assisted her in alighting. They were corroborated on this point by two of the passengers. The appellee and her daughter testified that the ground upon which the box was placed was rocky and uneven, but the kind and size of the stones they do not state. The passenger who testified for appellee gave testimony to the same effect, but it is evident he did not know whether stones were broken rocks or mere pebbles. A son-in-law of appellee testified that he saw the ground some time previous to the accident, and that there were fragments of broken rock upon it. Four of defendants' witnesses deposed that the ground was covered with gravel, and was level and smooth as gravel could make it. The testimony of these witnesses also tended to show that plaintiff's fall was caused by her stepping upon the edge of the stool. Such being the evidence we must hold that appellants' first assignment of error, which calls in question its sufficiency to sustain the verdict, is not well taken. Notwithstanding the testimony of part of appellants that boxes of this character were in general use upon railroads to assist passengers in alighting, and that several passengers used the same box upon this occasion, and that none of them were injured, we do not think that the jury were bound to conclude that the appellants, in using it, exercised that high degree of care which their duty to the appellee required.

She was a passenger alighting from the car upon which she had been travelling, to take another, and to complete her trip under her contract with appellants. They owed her the duty of providing, not only a reasonably safe appliance for enabling her to alight, in order to make the transfer, but the safest that had been known and tested. It would be unreasonable to say that a small box or stool which presented the surface of about one square foot and rested upon a base but a little more extensive, and which was shown to be capable of being overturned, at least by an incautious step,

**Alighting—
Use of step-
ping stool.**

could be as safe as a platform, such as is in ordinary use among railroads. If it were not, the jury were authorized to find that the companies had not exercised the degree of care required of them. It is apparent, from the testimony in the case, that if a platform had been provided, or even a safe substitute, such as could not have been overturned by a step on the edge, the injury in this case would not have resulted; and it follows that no amount of testimony as to the length of time it had been used and the number of persons who had passed over it securely, or of expert opinion as to its safety, ought to be permitted to overcome the undoubted physical facts in evidence. It follows that, in our opinion, the court did not err in giving the charge complained of in the third assignment of error. The statement under the assignment in the brief is that "the court charged that if defendants failed to furnish such facilities, appliances or assistance to plaintiff in alighting at Taylor as prudent and competent persons in the same business would commonly employ in like situations and circumstances, and plaintiff's injury resulted therefrom, to find for her, unless she was guilty of contributory negligence." If there is error in this, it is an error which is favorable to appellants.

The appellants also asked the following instructions, which were refused: "It was not the legal duty of defendants to have assisted plaintiff in alighting from the car, if reasonably safe and proper appliances were supplied, so that she could with reasonable care have safely alighted therefrom." "If the platform or depot ground at Taylor, at the time of the injury received by plaintiff, and the stepping stool on which she alighted, had been in daily use for years and had proved adequate and safe for receiving and delivering passengers, then defendants could use the same without the imputation of negligence; and, if you so find the facts, you will find for defendants." It may be conceded that if appellants had had a proper platform at the station, upon which the passengers could have alighted, their duty as to this matter would have been discharged, and that they were not called upon to render personal assistance. But we think, in order for them to claim immunity for the failure in this particular and for the use of an appliance less safe, it was their duty at least to render such assistance to passengers as to make the use of the stool as safe as a platform would have been. From what we have already said it is obvious that the latter instruction requested should not have been given. The carrier must furnish the passenger not only a reasonably safe appliance, but the safest. It is also complained that the court erred in qualifying charge No. 3 asked by appellants. The charge, as qualified, is as follows: "If you believe from the evidence, or a preponderance of the evi-

**Assistance
to passenger
alighting.**

dence, that the stepping stool used by defendants for passengers to alight on, at the time plaintiff was injured, was a reasonably safe appliance for the purpose, and it was properly placed on ground sufficiently smooth or even, so as to prevent it from turning or tilting by the use of due care on the part of passengers, *and the defendants were not guilty of negligence in using it, nor otherwise guilty of negligence, you will find for defendants.*"

Negligent
use of
stepping
stool.

The modification consisted in the insertion of the words which appear in italics. We think the charge was not proper without the qualification, and with it is quite as forcible as appellants had a right to demand.

The appellants also asked a charge to the effect that "if the plaintiff stepped carelessly or accidentally on or near the edge of the box, and her fall was occasioned thereby," the jury should find for defendants. This charge was also refused, and in this there was no error. A proper instruction upon contributory negligence had been given in the general charge. This counsel for appellants admits in his brief. There is no middle ground. If plaintiff exercised due care in stepping upon the box, and she was thrown down and injured, it follows that it was not the best appliance that could have been used to insure the safety of passengers in descending from the cars and defendants were guilty of negligence. If there had been a platform, the accident could not have happened. There was negligence either upon one side or the other, and hence there was no evidence upon which to base a theory of pure accident.

The whole case comes to this: that if the plaintiff's own negligence did not contribute to the injury (upon which the jury were fairly and pointedly instructed), upon the undisputed facts in evidence, the appellants are responsible for the injury. Even if it had been proved that assistance was rendered to plaintiff in descending from the car, it would but have shown that, despite the help, the stool was still unsafe.

We find no error in the judgment, and it is affirmed.

Passenger—Alighting—Reasonable Time.—What is a reasonable time under all circumstances of the case for allowing passengers to alight, is wholly a matter of fact for the determination of the jury, and it is error to instruct them that "what would be a reasonable time for a man" to alight from a train "would not be for a lady that is aged." *St. Louis, Arkansas & Texas R. Co. v. Burns* (Tex.), 9 S. W. Rep. 467.

Same—Contributory Negligence—Nonsuit.—At a usual stopping place to receive and discharge passengers there was no station or platform. Plaintiff instead of getting off on the side where passengers usually alighted, stepped off on the other or track side of the road, and was injured by a passing train. Had he looked for the train he could not have failed to see it, and at a sufficient distance to have avoided the accident. *Held*, that the fact that there was a smoother surface where he alighted, and therefore it was easier to get down, was no justification for the plaintiff's negligent act in the absence of allegation or proof that

it was unsafe to alight in the usual place, and that a nonsuit was properly entered. *Morgan v. Camden & Atlantic R. Co.* (Pa.), 16 Atl. Rep. 353.

Where the evidence shows that an intending passenger had been warned of the approach of his train; that the train could be seen for a distance of half a mile by a person six feet from the track; and that deceased was injured whilst facing the headlight, the evidence is sufficient to warrant the court in directing a verdict for the defendant. *Pennsylvania R. Co v. Bell* (Pa.), 15 Atl. Rep. 561.

In an action for damages for being carried past a railroad station, plaintiff contended that the train did not stop long enough for her to leave it, and the evidence relative thereto was conflicting. There was some evidence that plaintiff was on the alert, ready to leave the train if it stopped. *Held*, that a charge that if the train stopped at the station for a time reasonably long enough for the passengers, including plaintiff, to get off, plaintiff cannot recover, is not subject to the objection by defendant that plaintiff did not know when she arrived, and made no effort to leave the train. If by defendant's fault plaintiff was carried by the depot a distance of a mile, according to plaintiff's testimony, and 250 yards, according to others, and was not fully informed of the difficulties in the way of getting back, burdened as she was with two children, and without money, and the time being about midnight, it was not her duty to go to the next city, rather than attempt to get back home. *Galveston, Houston & Henderson R. Co. v. Crispi* (Tex.), 11 S. W. Rep. 187.

Same—Contributory Negligence—Province of Jury.—Whether by the use of ordinary care a pregnant woman could avoid the consequences to herself of the negligence of a railway company, in not providing a safe and suitable place to alight from the cars, the conductor having designated the place as suitable and assisted her to alight, is a question for the jury. The matter being doubtful, and the doubt not being soluble by the record to the satisfaction of this court, the judgment of the superior court denying the company a new trial will not be reversed. The like rule holds touching the question whether, after receiving the injury, the woman could, consistently with ordinary prudence, undertake a short journey to reach her home, rather than remain at the station, and take immediate precautions to obviate the threatened consequences. *Georgia Railroad & Banking Co. v. Usey* (Ga.), 8 S. E. Rep. 186.

Entering Car—Pregnant Woman—Absence of Stepping Stool.—A pregnant woman entered a passenger train at a place where there was no platform, or other convenience for boarding trains, and, in doing so, was so injured that she was obliged to break the journey at an intermediate point. In entering the car she was assisted by some of the defendant's employees. The evidence showed that women had frequently entered the cars in the same manner as she had without receiving any injury. *Held*, that the jury having been properly instructed as to the passenger's contributory negligence, and having returned a verdict for the plaintiff, her husband, the court could not hold as a matter of law that she was guilty of contributory negligence in entering the train, in the manner in which she did, and therefore was not justified in setting aside the verdict. *Missouri Pac. R. Co. v. Watson* (Tex.), 10 S. W. Rep. 731.

Alighting from and Boarding Stationary Train.—Where a train has come to a stop and a passenger in stepping from the lowest step of the platform of the cars to the ground, sustains an injury without any apparent cause, no presumption of negligence on the part of the railroad company is raised. *Delaware, L. & W. R. Co. v. Napheys*, 90 Pa. St. 135; s. c., 1 Am. & Eng. R. R. Cas. 52. It has been held, that railroad companies are obliged to provide platforms or safe places of deposit for passengers to alight on at their stations, and that if the train be stopped at a place at which there is no platform, the company is bound to assist the passengers to alight; *Memphis & C. R. Co. v. Whitfield*, 44 Miss. 466; and in the case of passengers entering cars, it has been declared that if the railway company does not receive its passengers into the car at a platform constructed for the purpose, it is its duty to use the utmost care in preventing accidents to passengers while entering the cars, and it is a question for the jury, dependent upon the evidence, whether the company owes to passengers the duty of

assisting them to enter the cars. *Allender v. Chicago, R. I. & P. R. Co.*, 43 Iowa 276.

If a train is not stopped at the platform, it is usually a question for the jury whether the plaintiff was guilty of contributory negligence in attempting to alight without assistance. *Delamatyr v. Milwaukee, C. & St. P. R. Co.*, 24 Wis. 578; *Foy v. London, B. & S. C. R. R. Co.*, 18 C. B. (N. S.) 225. But in *Evansville & C. R. Co. v. Duncan*, 54 Ill. 133, it was held that a woman who had been travelling on a box car was not guilty of contributory negligence in leaping from it after the train had been stopped and no means of descent had been provided, unless she had reason to expect injury from the leap. Where the car upon which the passenger was travelling stopped short of the platform, but the plaintiff might, by passing through the forward car, have reached the platform, it was held that she was guilty of contributory negligence in attempting to alight. *Eckerd v. Chicago & N. W. R. Co.*, 27 Am. & Eng. R. R. Cas. 114.

In an action to recover damages for injuries sustained by the plaintiff, an inexperienced country girl, who had never been on a train before, it appeared that the injuries were caused through slipping or being pushed off the platform on the side opposite the one she had ascended, and it was held that an instruction that the plaintiff was entitled to recover if the accident could have been averted by the skill and care of the defendant or its servants, was erroneous. *Chicago, St. L. & N. O. R. Co. v. Trotter*, 61 Miss. 417; s. c., 18 Am. & Eng. R. R. Cas. 159.

Where a passenger has received injuries in attempting to alight when the train has overshot the platform, the English cases hold that there is sufficient evidence of negligence on the part of the carrier to justify the submission of the issue of the jury. *Robson v. Northeastern R. R. Co.*, L. R., 2 Q. B. Div. 85; s. c., L. R., 10 Q. B. 271; *Rose v. Northeastern R. R. Co.*, L. R., 2 Exch. Div. 248; *Nichols v. Great Southern & W. R. R. Co.*, 7 Ir. R. C. L. 40; but see *Siner v. Great Western R. R. Co.*, L. R., 3 Exch. 150.

NEW YORK, CHICAGO AND ST. LOUIS R. CO.

v.

DOANE.

(*Indiana Supreme Court, September 20, 1888.*)

Passengers—Freight Train—Platform—Duty of Company.—It is the duty of a railroad company to discharge passengers carried upon a freight train at a platform, or, if impracticable, at some other convenient or appropriate place; and the passenger is not guilty of negligence in failing to leave such train when the car in which she is travelling is stopped several hundred feet from the platform and upon one side there is an embankment at the bottom of which is a ditch, and on the other side a train of standing cars, and no assistance is offered to such passenger to alight and to reach the platform.

Same—Alighting—Contributory Negligence.—A passenger upon a freight train, who did not alight because the cars were not stopped at the platform, was carried past her station about eighty or ninety rods. The conductor refused to back the train down to the platform and told her to alight. In attempting to regain the station by walking along the track, the passenger fell into a cattle pit and was injured. *Held*, that it was the duty of the railroad company under the circumstances to back the train down to the platform, and that the company had not

exercised due care in requiring the passenger to alight at the place where she did, and that she was not guilty of contributory negligence in attempting to cross the cattle pit under the circumstances.

Same—Personal Injuries—Excessive Damages.—A verdict for \$1,000 for injuries sustained by a middle-aged woman, consisting in the breaking of an arm, which not only proved very painful, but also permanently weakened it, is not excessive.

APPEAL from Suffolk Court, Kosciusko County.

ACTION to recover damages for personal injuries.

Frazer & Frazer and *John B. Coles* for appellant.

Adamson & Cook for appellee.

NIBLACK, C. J.—Notwithstanding some discrepancies between witnesses on certain matters of minor importance, there was evidence in this case very strongly tending to establish

Facts. the following facts: That during the year 1883, as well as since that time, the appellant, the New York, Chicago & St. Louis Railway Company, ran a train of cars known as a local freight train daily over its line of road between a point near the city of Chicago, in the state of Illinois, and the city of Fort Wayne, in this state; that it was in the habit of carrying passengers in a caboose attached to the rear end of that train, between all the stations on that part of its line of road; that the appellee, Rebecca Doane, on the 18th day of June, 1883, entered the caboose of that train at a station on the road known as Mentone, for the purpose of being conveyed as a passenger to a station nine or ten miles further east, called Claypool, and paid to the conductor of the train the amount demanded by him for transportation to the station last named; that there was a depot or station house, with a platform 40 or 50 feet attached, on the north side of the road at Claypool; that the train consisted of near, if not quite, 30 cars; that when it reached Claypool it stopped along side of the platform, the caboose standing on the track at least several length of cars, and probably several hundred feet, west of the platform; that several freight cars were, at the time, standing on a switch on the south side of, and immediately adjacent to, the caboose; that on the north side of the caboose a ditch containing some water, several feet deep and four or five feet wide, ran along near and parallel with the railway track; that Mrs. Doane was unable to see any safe or convenient way of getting out of or away from the caboose; that there was a plank across the ditch, some 50 or 60 feet east of the caboose, over which persons sometimes walked, but the strip of ground between the ditch and the railway track was so narrow as to make it impracticable for her to attempt to reach the plank with her two bundles of baggage which she was carrying with her; that, being told by one of her fellow passengers that the train would probably pull up to and let her off at the platform, she remained in the

caboose; that at or about the time the train stopped the conductor and the only brakeman then near it left the caboose, without giving Mrs. Doane any directions as to how or when she could safely leave the train, and without offering her any assistance in leaving it; that before leaving the caboose the brakeman announced the name of the station, but, from dullness of hearing or some other cause, she did not hear the announcement; that she was, however, otherwise informed that the train was approaching Claypool; that after the expiration of 15 or 20 minutes the train proceeded on its way east, without stopping at the platform; that in passing the platform the conductor stepped from it into the caboose, and, seeing that Mrs. Doane was still on the train, he climbed on top and gave the necessary signal to have the train stopped; that the train was stopped accordingly, on a curve 80 or 90 rods away from, but still in sight of, the station-house; that Mrs. Doane thereupon demanded that she should be returned to the station by backing up the train, but the conductor declined to so back up the train, and requested her to get off where the train then was, which, with his assistance, she did, the locality being one with which she was entirely unacquainted; that on her reaching the ground the conductor either said or did something which impressed her with the belief that she could easily get back to the station by walking on the railway track, and that this was the best route for her to take; that where she left the train there was a wire fence, consisting in part of barbed wires, on both sides of the railway track, running back to a railroad crossing near the station-house; that, seeing no other way open to her, she, with her bundles, started along the track in the direction of the station-house; that she had proceeded only a short distance when she came to a cattle-pit, from which plank fences three or four feet high extended each way to the respective wire fences; that, realizing the danger there might be in attempting to pass over the cattle-pit, but failing to observe any means of getting around it, and fearing she might be caught by some other passing train, she stepped upon and started to walk over the cattle-pit, exercising as much care as was consistent with her then excited and very nervous condition; that when about half way across the cattle-pit she fell, and broke one of her arms near the wrist, and was otherwise bruised and injured; that with the assistance of a gentleman, who came to her relief, she got back to the station-house, where she received surgical aid and attention; that the injury to her arm had proved to be a very painful and permanent injury; that her wrist had not regained, and never would regain, its normal condition, her arm being thus left in a maimed and weakened predicament. It was also shown that somewhere not far from where Mrs. Doane left the train there was a gate, on the north side of the road, which opened into a private lane leading north through

a farm; that some distance further north there was another gate, on the west side of the lane, which led into an open field; that she might have gone through these two gates, and thence through the open field, and by circuitous route have reached the station-house without walking upon the railway track, but she had no knowledge of the fact that she might get to the station-house in that way, and nothing occurred to direct her attention to the practicability of her getting back by that or any other route outside of the railway track. A jury returned a verdict in favor of Mrs. Doane, assessing her damages at \$1,000, and, over exceptions reserved, judgment was given upon the verdict. Error is assigned upon the overruling of a demurrer to the complaint, which consisted of two paragraphs, and the refusal of the circuit court to grant a new trial.

In support of the errors assigned it is sought to be maintained in argument—First, That upon the facts contained in the complaint and substantially proven at the trial, Mrs. Doane was guilty of contributory negligence in not leaving the caboose when the train stopped at Claypool, and also in attempting to walk back along the railway track and over the cattle-pit after she left the train; secondly, That upon the facts as stated, the injury complained of was too remote to constitute a cause of action against the railway company; thirdly, That the damages assessed were, in any view which ought to be taken of the facts as proven, excessive; fourthly, That certain instructions given to the jury were erroneous.

A railroad company may refuse to carry passengers on its freight trains, but if it admits a person into a caboose attached to one of its freight trains, to be transported as a passenger, and takes the customary fare for his transportation as such, it incurs the same liability for his safety as though he had taken passage in one of its regular passenger coaches. It is neither expected nor required that a passenger upon a freight train shall be provided with all the comforts and conveniences which are usually afforded passengers on a regular passenger train, but there is on that account no diminution in the obligation of those in charge of the freight train to carry its passengers with becoming and all necessary care, and to deliver them safely at, or conveniently near, their respective places of destination. It is the duty of a railroad company engaged in the transportation of passengers, whether by freight or passenger trains, to so run and manage its train, and to so handle its passengers, that no one shall be injured by its own negligence. 2 Wood, Ry. Law, 1121 *et seq.*; Ohio & M. R. Co. v. Selby, 47 Ind. 471; Ohio & M. R. Co. v. Dickerson, 59 Ind. 317. It is also the duty of a railroad company to provide suitable stations and platforms to enable

**Passengers
on freight
trains—
Duty of
company.**

persons to enter its cars, and passengers to safely alight when they have accomplished their journey. As pertinent to that duty, Wood, *supra*, at section 305, on page 1123, says,—and we have no doubt, correctly,—that “the trains must be stopped at the station, so that passengers can alight upon the platform, and if they are stopped at any other place, and the station is called, so that passengers are required or have a right to understand that they are required to stop there, the company is liable for injuries received in leaving such place, to the same extent and upon the same ground that it would be liable for injuries received from the defectiveness of its own premises.” *White Water R. Co. v. Butler*, 112 Ind. 598. These general principles apply as well to the carrying of passengers by freight as by passenger trains, subject only to such modifications as are made necessary by the nature of the business in which freight trains may be engaged.

Where a freight train is accustomed to discharge its passengers at some place other than the platform, or when it is impracticable for it to reach the platform with its caboose or other car in which its passengers are carried, it may require passengers to leave its train at some other appropriate and convenient place not connected with the platform. In such an event, however, passengers are entitled to receive such care and attention as are necessary to enable them to properly reach the station, and this is especially so where the place at which they are discharged is either inappropriate or inconvenient. *Woolery v. Louisville, N. A. & C. R. Co.*, 107 Ind. 381. Further on, at page 1186, the same author says that “if the train overshoots or stops short of the platform, at an unusual place, it is held that the company is bound to assist the passengers to alight; and, in any event, in such case, it would be its duty to either back the train to the station, or notify the passengers where and how to alight, and warn them of any dangers incident to alighting at that point; and if, through no fault of the passenger, he is injured by alighting at that point, or in getting from there to the station or highway, the company is liable therefor.”

Applying these principles to the facts of this case, the railway company failed in its duty in not either stopping the caboose at the platform at Claypool, or assisting Mrs. Doane to alight from the train which stopped west of that place, and to reach the station in safety. Under all the circumstances, she was justified in not leaving the caboose where it stopped, as well as in inferring that it would be pulled up to the platform before leaving the station. It also failed to perform a plain and very urgent duty when it neglected to either back its train to a convenient point near the station, or to give her such assistance or instructions as were necessary to assure her safe return to the station-house after it

had carried her beyond her place of destination. The duty of a railroad company as a common carrier of passengers is not fully performed until it delivers its passenger, in proper condition, at the station to which he has paid his fare. Mrs. Doane was not guilty of negligence in failing to discover some gates leading into private enclosures, and into an open and remote field, through which she might have returned to the station by an unmarked and circuitous route. It was, under the circumstance, not only natural, but reasonable, aside from any directions or intimations which the conductor may have given her, that she should have attempted to follow the railway track back to the station-house. Until she reached that point, she was still constructively a passenger on the railway train, and had a right to rely upon any information or directions which she may have received from the conductor. See *Wood*, above cited, pp. 1124—1126. Nor was Mrs. Doane guilty of contributory negligence in her effort to walk over the cattle-pit. It was important to her that she should pass that place in some way, and within a reasonable time, and no other practicable method of passing it was apparently open to her. It is a matter within the common knowledge of all that a person may, by the exercise of high degree of care, ordinarily walk with safety over a cattle-pit. But a cattle-pit is not a suitable place to compel a passenger to walk over to reach the end of his journey, and it was negligence on the part of the railway company to place her in a position which seemingly required her to incur the hazard of walking upon such a place. It is an old rule that where one person places another in such a situation that the latter must adopt a perilous alternative, the former is responsible for the consequences. *Jones v. Boyce*, 1 Starkie, 493. A practical application of this rule in aid of the general principles previously announced as above, leads us to the further conclusion that the injuries to Mrs. Doane were proximately caused by the negligence of the railway company. This view is fully sustained by the cases of *Cincinnati, H. & I. R. Co. v. Eaton*, 94 Ind. 474, and *Terre Haute & I. R. Co. v. Buck*, 96 Ind. 346.

Nothing is shown from which we can infer that the damages were excessive. Notwithstanding Mrs. Doane had, at the time of her injuries, passed the meridian of life, the maiming and permanent disabling of her arm was no trivial matter to her. She thereby became very materially less able to earn her own living (which she had been accustomed to do) for the rest of her life. The amount she recovered impresses us as a very moderate compensation for the injuries for which she sued.

Objections are specifically made to some of the instructions given to the jury, but none of the instructions complained of are inconsistent with the legal principles we have applied to the evi-

dence, and hence what we have already said practically disposes of all the questions made upon the instructions. Having in view the same legal principle, the demurrer to the complaint was rightly overruled. The judgment is affirmed, with costs.

Alighting—Moving Train.—Just before the station which was the destination of a passenger was reached, the conductor called out its name. The train moved on about 165 yards past the platform, and the passenger thereupon jumped off whilst it was still in motion. After he jumped the train proceeded a little further and then backed down on a side track. *Held*, that the passenger's negligence in jumping from the train whilst in motion was the cause of the accident, and that a nonsuit should have been granted. *Savannah, Florida & Western R. Co. v. Watts* (Ga.), 9 S. E. Rep. 129. If a passenger is carried past his destination, that fact does not justify him in jumping from the moving train, and the plaintiff in an action to recover damages for injuries sustained through so leaving the train ought to be non-suited. *Watson v. Georgia Pac. R. Co.*, (Ga.) 7 S. E. Rep. 854.

Same—Province of Jury.—In *Philadelphia & Reading R. Co. v. Edelstein* (Pa.) 16 Atl. Rep. 847, the plaintiff sued to recover damages for injuries sustained in alighting from one of the defendant's trains. The conductor made the announcement that the next stoppage of the train would be at Jenkintown. Shortly thereafter the train stopped and some one called out Jenkintown. The plaintiff thought the train had reached the station and got off hurriedly. In point of fact, the train had been signaled and had stopped short of the station. It was a dark rainy night and freezing. When he stepped down he fell into a creek and was injured. *Held*, that the question of the defendant's negligence and the plaintiff's contributory negligence were for the jury.

Deceased was a passenger on a train from P. to C. The night was dark. Just before the train reached W. the conductor passed through the car, and announced that passengers for C. and intermediate stations would change cars at W. Shortly afterwards the train stopped, not at the station, but upon a bridge. No announcement was made that the train had not reached the station, and the deceased stepped off in the darkness, and fell through the bridge and was killed. *Held*, that, under such circumstances, it was not error to submit the question of the negligence of the railroad company to the jury. *Philadelphia, Wilmington & Baltimore R. Co. v. McCormick*, (Pa.) 16 Atl. Rep. 848.

In an action to recover damages for personal injuries, the plaintiff testified that the train was due at its destination about 2 o'clock at night, that the whistle blew; that the conductor came through the cars and a lady asked him what station it was, and that the brakeman opened the front door of the car and called out the name of plaintiff's destination. He also testified that the train stopped, and he and several other passengers proceeded to leave the car, and that he stepped off and fell through a trestle to the ground below. He had been at that station twice before, but never during the day time. No warning of any kind was given him and there was no light there. The trestle upon which the train was stopped was one hundred and fifty to two hundred yards from the station. It was held to be error to instruct the jury to the effect that if plaintiff was familiar with the station and knew on which side of the track the same was situated and was aware of the fact that the train had not reached the depot and under these circumstances, and in the dark, without any direction from defendant's employe, attempted to alight on the side other than that on which the station was, he was guilty of negligence and the verdict should be for the defendant. *International & Great Northern R. Co. v. Eckford*, (Tex.) 8 S. W. Rep. 679.

In an action against a carrier for compelling plaintiff to leave its train some distance from the depot and to walk along a track having an open culvert, into which plaintiff fell, receiving the injuries complained of, where there is some evidence tending to show that plaintiff fell into the culvert while attempting to help a companion out, it is error to refuse to submit such question to the jury. *Kreuziger v. Chicago & North Western R. Co.*, (Wis.) 40 N. W. Rep. 657.

Same—Absence of Employees.—In an action to recover damages for injuries sustained while alighting from a passenger train in the dark, the court instructed the jury that "It is the duty of all employes of a railroad company, entrusted with the management and control of passenger trains, to be at their posts of duty while the train is in motion, and when the passengers are coming on board or departing from said train; but their absence from their posts would not entitle the plaintiff to recover unless such absence caused the accident, or contributed in a material degree thereto; and passengers upon trains must use their senses, and take the responsibility of informing themselves concerning the every-day incidents of railway travelling; and if there is nothing in the evidence from which the jury may conclude that the injury was caused by some act or omission not incident to the constant usage of the carrier, or indicating fault on the part of the employes of the company, they must find the verdict for the defendant." *Held*, that this instruction encroached upon the province of the jury to determine whether the plaintiff's acts and omissions constituted negligence. *International & Great Northern R. Co. v. Eckford*, (Tex.) 8 S. W. Rep. 679.

ST. LOUIS, ARKANSAS AND TEXAS R. Co.

v.

MACKIE.

(*Texas Supreme Court, October 19, 1888.*)

Evidence—Res Gestæ—Declarations of Ticket Agent.—Declarations of a ticket agent made some days after the sale of the tickets out of which the plaintiff's right of action arose, are not admissible as part of the *res gestæ*.

Passenger—Mistake of Ticket Agent—Right of action.—If a ticket agent by mistake or otherwise issues to an intending passenger second-class, instead of first-class, tickets, such passenger is entitled to recover damages for being moved from a first-class into a second-class car and compelled to travel therein notwithstanding the fact that the conductor offered to allow him to remain in the first-class car provided he paid the extra charge applicable thereto; nor is his right of action affected by the company's rule that the conductor can only look to the ticket and cannot enquire whether a passenger is entitled to a passage other than that appearing upon the ticket.

Same—Failure to purchase Ticket.—Where a second-class, instead of a first-class, ticket has been issued to an intending passenger, the failure of the passenger to pay the difference between first-class and second-class fare whilst upon the train, does not affect his right of action, and it is not error for the court to refuse to so instruct the jury.

Same—Measure of Damages.—Where, through the mistake of the ticket agent, plaintiff and his wife had been compelled to travel in a second-class instead of in a first-class carriage, the plaintiff is entitled to recover damages for injuries sustained by his wife in consequence of the discomforts of the carriage and the disorderly conduct of the other passengers.

APPEAL from District Court, Henderson County.

Action by N. A. C. Mackie against the St. Louis, Arkansas & Texas R. Co. to recover damages for the negligence of the defendant's ticket agent in issuing to the plaintiff second-class instead of first-class tickets, whereby plaintiff and his wife were compelled to

travel in a second-class car. The defendant appeals from a judgment for the plaintiff.

Clark, Byer & Bolinger for appellant.

Richardson & Watkins for appellee.

STAYTON, C. J.—Appellee, desiring, with his wife and two young children, to go from Athens, Tex., to some place in North Carolina, applied to the appellant's agent at Athens, Tex., for through tickets to Nashville, Tenn. Tickets **Facts.** were issued to him, for which he paid the price charged by the company for first-class tickets; but, by mistake or otherwise, tickets were delivered to him which entitled him and family to travel only in a second-class car. He did not examine the tickets when they were delivered to him, but, on the arrival of the train, with his family entered a first-class car on the appellant's railway. After the train had travelled but a few miles, the conductor called for his tickets, which were produced, when the conductor required him and family to leave the first-class car, and take seats in a second-class car; and, while no force was used by the conductor in bringing this about, it was done under circumstances calculated to humiliate and mortify the feelings of the appellee and his wife, who, from the record, appear to have been people of refinement and intelligence. At the time this was done, and at all other times during the trip, when, on any of the roads over which the tickets took the appellee and his family, the appellee was refused passage in a first-class car, he explained to the conductors the circumstances under which the second-class tickets were delivered to him. The conductors offered to permit the appellee and his family to travel in a first-class car if he would pay one cent per mile on each ticket in addition to what he paid for the tickets. This he refused to do, as appears from his evidence, because he had paid for the tickets a sum that entitled him to first-class tickets; but it is rendered probable by the evidence that he had not money sufficient to pay this demand, and pay the other necessary expenses of himself and family until they would reach their destination. It is alleged that the second-class coaches in which the appellee and his family were compelled to travel from Athens, Tex., to Nashville, Tenn., were uncomfortable, foul with smoke, dirt, and filth, and filled with negroes and coarse whites, who smoked tobacco, drank whisky, and used violent, profane, and obscene language in the presence of appellee and his family; in consequence of which it is alleged the appellee and his family were greatly humiliated and injured, physically and mentally. It is further alleged that the misconduct of the persons in the cars was open, and that no effort on the part of the officers in charge of trains was made to prevent it. It was further alleged that tobacco smoke caused nausea to the appellee's wife. The matters

thus alleged are proved in great detail. There was a verdict and judgment for \$17 for injuries to the appellee, and for \$500 for injuries to his wife.

On the trial, a witness, over the objection of appellant, was permitted to state that a few days after the tickets were sold to appellee he had a conversation with the agent of appellant at Athens, Tex., in which the latter told him that the price for first-class tickets from Athens, Tex., to Nashville, Tenn., was \$22.45. This was the price paid by appellee for each ticket delivered to him, and the objection to the evidence was that it was not *res gestæ* but hearsay, and therefore inadmissible. It may be admitted that this objection ought to have been sustained; but if from the record it appears that the proof of the same fact sought to be thus established was made by other evidence, admitted without objection and un rebutted, then this ruling furnished no ground for reversal. The same witness, whose evidence, as above stated, was objected to, was permitted to state without objection that the appellant's agent at Athens told him "that there was but one price for tickets sold to Nashville, and that was \$22.45, and that they never sold any but first-class tickets; that no second-class tickets were ever sold to that point. Champers (the agent) showed me the stubs of the two tickets which were sold to Mackie and his wife, and which they still had in the office, and the stubs showed that they were sold as first-class tickets." The last part of this evidence was brought out by the appellant, and there is no conflict of evidence as to the price paid by appellee, nor as to the price of first-class tickets. In this state of the record, if the court erred in admitting the evidence objected to,—a matter we need not decide,—the ruling was harmless, and furnishes no ground for reversal.

It is urged that as the appellee might have procured seats in first-class cars by the payment of \$17 in addition to the full price for first-class tickets, which he had already paid, his failure to do so relieved the appellant from liability. A defense of this character was pleaded, and the failure of the court below to submit it to the jury is assigned as error. The case made by the pleadings and proof is that appellee made a contract with appellant whereby the latter, for a consideration paid, agreed to transport the appellee and his wife in first-class cars, over its own and connecting lines, from Athens, Tex., to Nashville, Tenn., which was violated. The violation of this contract entitled appellee to recover damages; and if it was the duty of appellee to have paid the additional sum demanded, and thereby to have secured the accommodations and services for which he had contracted and paid, then his failure to do so could not defeat

Evidence—
Declarations—Res gestæ.

Mistake of ticket agent—Right of action—Payment of difference.

his action, but would affect the measure of damages. The charge asked would have made his failure to pay the additional sum demanded a defense to the entire action if, by its payment, the appellee would have received the services and accommodations he was entitled to receive without such additional payment. A charge leading to such a result was not only misleading, but clearly erroneous, and was properly refused. The rule invoked by the appellant has been applied in many cases, and is wholesome in its operation, in a case in which it is applicable; but we are of the opinion that it ought not to be applied in the case before us. There is no question of negligence in this branch of the case; the court having carefully submitted to the jury whether the receipt of second-class tickets by appellee, without examination, was the exercise of such care as a prudent man would ordinarily have exercised under the circumstances existing when they were received; and the only question is, does the law, under the facts of this case, impose on a person situated as was the appellee the duty of doing more than his contract requires, as a condition on which he will be permitted to recover damages naturally growing out of a violation of the contract by the other party, who at the time of its violation has the means to comply with it, and knowingly refuses to do so?

The appellant made a contract to transport, or to cause to be transported, in a first-class car, the appellee and his family, from one named place to another, and for this service received in advance the compensation demanded. This contract was made by an agent, who failed through mistake or otherwise to give the written evidence of it; but it was nevertheless the contract of the appellant, who is charged with knowledge of all the terms of it. Knowing the terms of the contract, through another agent, it violated it, and we may say did so under circumstances that were aggravating in their character. Under the regulations made by the appellant, and other lines over which the appellee had to pass, it may have been made the duty of conductors to their companies to regard the tickets as the only evidence of the contract to which they could look for the regulation of their conduct; but the law affects the appellant with knowledge of the real contracts made by its agents, and it cannot be permitted to shield itself from liability for the non-performance of a contract on the ground that it had made a regulation which precluded its conductor from making any enquiry as to the real contract made, or from carrying it out. The making and enforcement of such a regulation rather aggravates than excuses the violation of the contract; for this withdraws from agents operating trains the power to correct a mistake, and comply with the contract actually made, although this might be easily done. But for such a regulation the conductor would probably, when in-

**Breach of
contract—
Instructions
to conductor.**

formed of the mistake in the tickets, have, as he might have done, ascertained, soon after the passage began, what the real contract and consequent right of the appellee was. It cannot be heard to say that it was ignorant of the terms of the contract, of its violation, or of the unauthorized demand, made by its agent a condition on which he would execute the contract. The duty of appellant was fixed by the contract based on full consideration paid, and the law recognizes no means whereby it can be more firmly imposed, or compliance with it made more imperative. It has been said that the rule insisted upon "is simply one of good faith and fair dealing," (*Gilbert v. Kennedy*, 22 Mich. 132;) and can it be true, under the facts of this case, that good faith and fair dealing required the appellee to pay a sum in addition to that paid, and deemed by appellant a sufficient compensation for the services it had contracted to perform, in order to be entitled to have the contract complied with, or to have damages for any injury resulting from its breach? We think not. It is not necessary, in this case, to undertake definitely, to determine under what states of fact the rule insisted upon may have application; but we do feel authorized to hold, from an examination of the cases to which we have access, that a party whose duty it is to perform a service necessary to the fulfilment of his contract, and to permit injury to result from its violation, may in all cases be looked to to fulfil that duty when he has equal knowledge and opportunity, and that he cannot be heard to urge in defence of an action based on his own breach of contract, and consequent violation of duty, either for the purpose of defeating the action or lessening the damages, that the injured party might have secured the performance of the contract, and thereby have prevented or lessened the injury, by paying to him an additional compensation to induce him to perform the duty which he had already been fully paid to perform. 1 Suth. Dam. 150. This holding affirms the correctness of the action of the court below in refusing to give the instructions asked by the defendant.

It is urged that the evidence did not warrant the verdict for damages for injuries to the wife of appellee, but we see no reason to doubt its sufficiency. Had the appellee and his

Damages. wife been entitled to passage in only a second-class car, we do not understand that the appellant would not then have been compelled to exercise due care to protect them from the discomforts resulting from the acts of other passengers, and not incident to the kind of car used for passengers of that class, whether those discomforts were physical or mental. A railroad company cannot subject passengers, even in a second-class car, to noxious influences, not necessarily or ordinarily incident to such travel, but brought about by the wrongful acts of other passengers, which the company, by the exercise of proper care and

due regard for the welfare of passengers, could prevent, without liability for injury resulting from such causes. The record shows that the wife of appellee was compelled to ride in a car full of tobacco smoke, which caused nausea; that she was compelled to ride where she could not avoid hearing rough, profane and obscene language, and witness acts of violence and drunkenness. These things carriers of passengers ought not to permit in vehicles in which they undertake to transport decent men; much less, refined and delicate women; and if they do, when they could prevent them by the use of due care, they must respond in damages based on injuries, physical and mental, which for their measure must largely depend on the honest exercise of the judgment and discretion of the court or jury trying the cause. In the case before us, however, the appellee and his wife were entitled to passage in first-class cars. From a car of that class they were expelled by the conductor on appellant's train, wrongfully, and in a manner calculated to humiliate and distress them. Thus were they compelled to take passage in cars in which the discomforts were greater than in the cars in which they were entitled to ride, and to suffer the unnecessary annoyances to which they seem to have been subjected. We cannot say that the evidence did not warrant the verdict and judgment, and the judgment will be affirmed.

Tickets—Mistake of Agent in Stamping.—If the purchaser of a round-trip ticket, after paying for and receiving it, perform all the stipulations of the contract on his part, or offer to do so in proper time and manner, the company is bound to recognize and honor the ticket when and wherever duly presented, notwithstanding any mistake or omission by its agents in signing or stamping the same. *Head v. Georgia Pacific R. Co. (Ga.), 7 S. E. Rep. 217.*

Same—Mistake of Conductor.—Plaintiff having purchased a round-trip ticket, the conductor upon the first trip lifted the ticket and gave a trip check or slip in return. The plaintiff relied upon the check as a return ticket and entered the defendant's car for her return journey. The conductor of the return train refused to accept the check and compelled plaintiff to leave the train before reaching her destination. *Held*, that the railroad company was liable to plaintiff in damages. *Baltimore & Ohio R. Co. v. Bambrey (Pa.), 16 Atl. Rep. 67.*

Same—Detaching Return Coupon.—Where a passenger purchases a ticket having a return coupon bearing the words "Not good for passage if detached," and the return coupon accidentally becomes detached, the company is liable if the conductor, on presentation of both parts, refuses to receive them and ejects the passenger. *Wightman v. Chicago & North Western R. Co. (Wis.), 40 N. W. Rep. 689.*

Same—Wrongful Refusal to Accept.—Where one purchases a ticket over a railroad which the conductor, acting under instructions, but without legal right, refuses to accept, and the passenger, refusing either to pay or leave the train, is expelled, the latter may recover the cost of a ticket from the point where he was expelled to his destination, and such damages as he sustained on account of the delay in being required to leave the train. In such case the passenger may also recover for the indignity in being compelled to leave the train; and, if more force was used than was necessary in ejecting him, he may recover for the personal injuries resulting directly from such excessive force. *Pennsylvania R. Co. v. Connell (Ill.), 20 N. E. Rep. 89.*

Expulsion of Passenger for Defect in Ticket.—See *Hubbard v. Grand Rapids etc. R. Co., 18 Am. & Eng. R. R. Cas. 336; Pennsylvania R. Co. v. Connell, and*

note, 18 Am. & Eng. R. R. Cas. 339, 345; *Murdock v. Boston & A. R. Co.*, 137 Mass. 293; s. c., 21 Am. & Eng. R. R. Cas. 268; note, 21 Am. & Eng. R. R. Cas. 275; *Philadelphia, W. & B. R. Co. v. Rice*, 64 Md. 63; s. c., 26 Am. & Eng. R. R. Cas. 264.

SOUTH FLORIDA R. CO.

v.

RHOADS.

(*Florida Supreme Court, January 18, 1889.*)

Passenger—Ejection—Pleading—Declaration.—In an action brought by a passenger against a railroad company to recover damages from the company for wrongfully expelling him from the defendant's train, it is not necessary for the declaration to allege that the passenger, at the time of his expulsion, was complying with all the reasonable rules of the company, nor to allege that the passenger was not about to violate any such reasonable rule at the time of his expulsion.

Contracts—Monopoly—Question of Law and Fact.—The question as to whether a contract or agreement entered into between the railroad company and a line of steamers plying between Jacksonville and Sanford, was entered into in good faith, and was legal and binding, or that such contract constituted an oppressive monopoly, and hence was not legal and binding, is a mixed question of law and fact, and it was properly left to the jury to be passed upon by them.

Regulations—Reasonableness—Question of Law.—The reasonableness of a rule prescribed by a railroad company for the government of its business is purely a question of law, to be decided by the court, and not a question of fact to be passed upon by juries.

Same—Uniform of Rival Company.—A rule adopted by a railroad company, which inhibited passengers on their trains from wearing the uniform cap of a line of steamers running in opposition to a line of steamers running in connection with the company, was not reasonable, and hence not binding on the public.

Passengers—Place of Expulsion—Usual Stopping Place.—The statute (section 41, c. 1987, Fla. Laws) prohibits the expulsion of a passenger by a railroad company for non-payment of fare at any point other than a usual stopping place, or near some dwelling house. When, however, a passenger wantonly violates any other reasonable rule of a railroad company, the obligation to transport him ceases, and the company may expel him from the train at any convenient and safe point that may be selected by the officer in charge, no more force being used than may be necessary for such purpose. This is a common-law right and has not been restricted by statute as in cases of non-payment of fare.

APPEAL from Circuit Court, Orange County.

Action for damages for wrongful expulsion from defendant's train.

S. M. Sparkman and *S. T. Kingsberry* for appellant.

Geo. U. Walker for appellee.

MITCHELL, J.—This cause was tried at the fall term, circuit court, 1885. The jury awarded the plaintiff \$5,000 damages. Motion for new trial made and overruled and the case is before this court upon appeal from the order of the circuit court over-

ruling said motion. The first error assigned is that the court erred in overruling the defendant's demurrer to the plaintiff's declaration. The declaration alleges that on the 25th day of April, 1885, the plaintiff was received by the defendant to be carried as a passenger on its cars from Sanford to Orlando, Orange county, Fla.; that the defendant did not and would not carry the plaintiff as such passenger as aforesaid, but, on the contrary, without reasonable and lawful excuse therefor, then and there, by its agent and servant, the conductor, and the train hands of its said train, by force and arm ejected plaintiff therefrom, and left him, and proceeded on its said journey; wherefore the plaintiff was injured in his person and feelings, and was compelled to travel afoot about four miles back to said Sanford, was prevented from accomplishing his purpose to go to Orlando, and was otherwise greatly damaged. Plaintiff claimed \$20,000 damages. Second count: Plaintiff claimed from the defendant the further sum of \$20,000 for damages for that whereas, heretofore, to-wit, the 25th of April, 1885, the plaintiff was a passenger on the railway passenger car of the defendant, and was with force and arms, without just, reasonable, or lawful excuse therefor, ejected from the said car, and forcibly prevented from returning to the same.

The declaration was demurred to, (1) that it is bad in substance, in that it does not allege that the plaintiff, at the time it is therein alleged he was put off the defendant's car, was complying with all the reasonable rules of said defendant; (2) that said declaration does not allege that plaintiff was not violating, or about to violate, any reasonable rule of said railroad company; (3) that plaintiff does not allege in his declaration that the defendant has or usually keeps an office for the transaction of its customary business in the county of Orange.

There was no error in overruling the demurrer to plaintiff's declaration. Gould, Pl. p. 164, § 17; 1 Chit. Pl. 390.

The circuit judge gave the jury a number of charges, or paragraphs of one charge, all of which except the last were excepted to by defendant. *Inter alia*, the judge charged the jury that "railroad companies, as carriers of persons, are not bound to receive for carriage or to carry persons whose purpose while travelling on the cars is to interfere with or injure the legitimate business and lawful profits of the company, nor persons who are of known and violently bad character, or persons offensively gross and immoral in their conduct, habits and behavior; or so intoxicated as to be offensive, nor such as will not conform with the reasonable rules and regulations of the company in respect to the carriage of passengers, they being informed thereof, or otherwise having knowledge of the same, nor such as refuse to pay their fare, or to procure tickets before entering the

train. Such objectionable persons, for the objections aforesaid, may not only be refused admission into the cars of the company if their objectionable conduct, purpose, character, or intention be known previous to such admission, but, having been received thereon, may be expelled therefrom on rendering themselves obnoxious to any of such objections; the officer in charge using no more force or offensiveness than becomes necessary to effect such expulsion. . . . A railroad corporation has the right to enter into an agreement with other lines of travel for the purpose of enhancing its own business, and for the benefit of the public, but it has not the right to enter into such agreement when it is for the purpose of an oppressive monopoly, or to the injury of the public. In furtherance of such agreements, they have the right to make all reasonable rules and regulations that will enable them to carry out in good faith the agreement, and can enforce such reasonable rules and regulations to the ejection of the violator of them. These rules and regulations can be made and enforced to carry out a legal and proper agreement, but they cannot be made to enforce an agreement which is entered into for the purpose of oppressive monopoly. Should you find from the evidence that it was a *bona fide* agreement, and not entered into for the purpose of an oppressive monopoly, and that the rules and regulations made to enforce same are reasonable, and the plaintiff well knew such to be the rules and regulations at the time of his ejection from the train, and that he was knowingly and wilfully violating the same, or that the conductor had from the facts that occurred to him at the time of the plaintiff's ejection good reason to apprehend that the plaintiff would violate one of such reasonable rules and regulations, you must find for the defendant. If, on the other hand, after viewing all the evidence, you believe that the rules and regulations were not reasonable, and that the plaintiff did not knowingly violate any reasonable rule or regulation, and that he paid his fare and went upon said train as a passenger, and properly demeaned himself and presented his ticket to the conductor, and was ejected by the conductor, and not allowed to go on the train to the destination his ticket called for, you must find for the plaintiff at such sum as you may, from the evidence, find him entitled to."

It will be seen that the judge, in this part of his charge, left it to the jury to decide whether the rules and regulations prescribed by the railroad company were reasonable. This was error. The reasonableness of rules prescribed by railroad companies, and like corporations with like powers, is a question of law to be decided by the courts, and not a question of fact to be decided by juries. Louisville & N. R. Co. v. Fleming, 18 Am. & Eng. R. Cas. 347; Vedder v. Fellows, 20 N. Y. 126; Maroney v. Old

Province of
court and
jury—Reasonableness
of rules.

Colony & N. R. Co. 8 Am. Rep. 305; Yorton v. Milwaukee, L. K. & W. R. Co. 41 Am. Rep. 23, 6 Am. & Eng. R. R. Cas. 322; Pittsburgh, C. & St. L. R. Co. v. Nuzum, 19 Am. Rep. 703; Pierce v. Randolph, 12 Tex. 290; 1 Ror. R. R. 226, 227; Illinois Cent. R. Co. v. Whittemore, 43 Ill. 420.

In the case of Railroad Co. v. Whittemore, *supra*, the supreme court of Illinois says: "The circuit court left it to the jury to say whether the rule was reasonable. This was error. It was proper to admit testimony, as was done, but, either with or without this testimony, it was for the court to say whether the regulation was reasonable, and therefore obligatory upon the passengers. The necessity of holding this to be a question of law, and therefore within the province of the court to settle, is apparent from the consideration that it is only by so holding that fixed and permanent regulations can be established. If this question is to be left to juries, one rule would be applied by them to-day and another to-morrow. In one trial a railway would be held liable, and in another, presenting the same question, not liable. Neither the companies nor passengers would know their rights or their obligations. A fixed system for the control of the vast interests connected with railways would be impossible, while such a system is essential equally to the roads and to the public."

That railroad companies have the power to prescribe such reasonable rules and regulations as may be found necessary in the conduct of their business, is indisputable. The validity of the rule depends upon its reasonableness. If reasonable it has the force and effect of law, but if unreasonable it is not obligatory upon the public to obey it.

Webster defines a "rule" to be "that which is prescribed or laid down as a guide to conduct; that which is settled by authority or custom; a regulation; a prescription; a minor law; a uniform course of things." It is the duty of courts to pass upon and construe the laws of the land, and, the reasonable rules and regulations established by a railroad being laws,—minor laws,—there is no good reason why the courts should not pass upon them, and pronounce them reasonable and binding, or unreasonable and not binding, as the case may be.

The question as to whether the alleged agreement between the defendant and the De Bary Baya Merchants' Line and the People's Line was "a *bona fide* agreement, and not entered into for the purpose of an oppressive monopoly," is a mixed question of law and fact, and was properly left to the jury to decide. And, if the alleged agreement was legal, the reasonable rules and regulations prescribed by the railroad company to enforce the stipulations of such agreement were also legal and binding; but, if the agreement itself was not legal, it follows, of course, that the rules

Traffic
agreement—
Monopoly—
Province
of jury.

and regulations prescribed for the enforcement of the stipulations of the alleged agreement were also illegal, and not binding. The rule prescribed by the railroad company inhibiting the wearing on their cars the uniform caps and badges of the officers and employes of the Independent Line of steamers was not a reasonable rule, and hence not binding upon the persons wearing them, and, if the company expelled any such passenger for wearing such cap or badge, such expulsion was illegal, and the passenger so expelled was entitled to damages therefor. Railroad companies have no right to so prescribe the dress of a passenger.

The court charged the jury that "the passenger should first be informed of the occasion and the necessity for leaving, and the train be brought to a standstill, at any usual stopping place, or near any dwelling-house, as the conductor shall elect. . . ." This part of the charge is evidently based upon section 41, c. 1987, Laws Fla., but the section referred to applies solely to the expulsion of passengers from railway trains for non-payment of fare. It is not applicable to the case at bar, because the plaintiff was not expelled for not paying his fare. Under this charge of the court the jury were compelled to find for the plaintiff. The plaintiff may have been guilty of the most immoral and indecent conduct. He may have been so intoxicated that he was offensive to other passengers, or his conduct may have been so violent as to endanger the lives of passengers and employes of the road, and yet under the charge the company had no authority to expel him at any point other than a usual stopping place or near a dwelling-house. We do not understand this to be the law. The statute only requires passengers who refuse to pay their fare to be put off trains at a usual stopping place or near some dwelling-house, and is silent as to what points passengers, for violating other rules of railroad companies, may be ejected.

In *Toledo, W. & W. R. Co. v. Wright*, 34 Am. Rep. 277, it is held that "a statute providing that, if any railway passenger shall refuse to pay his fare, he may be ejected at any usual stopping place, does not prohibit his ejection at any other safe point." And it is held by the supreme court of Illinois in *Illinois Cent. R. Co. v. Whittemore*, *supra*, that "the refusal of a passenger to surrender his ticket to the conductor when demanded does not constitute the same offence as the non-payment of fare, and the statutory prohibition against the expulsion of passengers for the later offence, except at a regular station, does not apply to the former case. A railroad company may expel a passenger from its train, at a place other than a regular station, for the violation of any reasonable rule other than that of non-payment of fare. . . . When a passenger wantonly disregards any reasonable rule, the obligation to transport him ceases, and the company may expel

him from the train, using no more force than may be necessary for such purpose, and not at a dangerous or inconvenient place. This is a common-law right, and has been restricted by statute only in cases of non-payment of fare."

The same rule prevails in this state. A railroad company, in ejecting a passenger for non-payment of fare, must do so at a usual stopping place, or near some dwelling-house. This is the only restriction imposed by statute as to the expulsion of passengers. It applies only to passengers who have not paid their fare. Passengers, for other violations of the reasonable rules of railroad companies, may be ejected at any convenient, safe point that may be selected by the officer in charge, no more force being used than is necessary.

There are many other objections urged against the charge of the court, but, after carefully examining and considering the same, it is, in our judgment, unobjectionable, except as before stated.

The defendant requested the court to give numerous charges to the jury; some were given and others refused, and the refusal to charge as requested by the defendant is assigned as error. These charges, except the ninth, were properly refused. The ninth charge requested by the defendant was as follows. "That the reasonableness of a rule or regulation prescribed by a railroad company is for the court to determine, and not for the jury." This charge should have been given, and the court erred in not doing so.

The grounds in motion for new trial are that the verdict was contrary to law; contrary to the evidence, and the weight of evidence; contrary to the charge of the court; and that the damages awarded the plaintiff by the jury were **Excessive damages**. Now, as the case, for the errors mentioned, will have to be reversed, and a new trial had, we do not desire or intend to express any opinion upon the evidence, except as to the amount of damages. The evidence sent up in the record conduces to show that the appellee was ejected from the cars of the defendants, April 25, 1885; that prior to said expulsion the appellants had entered into a contract or agreement with the De Bary Baya Merchant's Line and the People's Line of steamers, plying between Jacksonville and Sanford, by which agreement the steamers of said lines were to await the arrival of the trains on the South Florida road, and that the trains were to await the arrival of the steamers of said lines; that the steamers were to procure freight and passengers for the road, and that the road was to do the same for the steamers of said lines; that there was an opposition line of steamers running on the St. Johns river, between Jacksonville and Sanford, known as the "Independent Line;" that the competition between the railroad company and the steamship lines, with which it had said agreement or con-

tract, and the Independent Line was very sharp; that the appellee at the time (April 25, 1885), was purser on the steamer Chesapeake, one of the boats of the Independent Line; that the appellee drummed and solicited freight and passengers for the steamers of the Independent Line; that the appellee went on the docks of the defendant at Sanford for the purpose of soliciting business for the Independent Line, and that he went on the trains of the defendant railroad company for the same purpose; that the railroad company had established and published rules and regulations prohibiting such soliciting business on their said docks and trains; that the appellee had notice of the existence of such rules and regulations; that one of such rules prohibited the officers and employers of the steamers of the Independent Line from wearing the uniform caps and badges of said steamers on the trains of defendant; that on the 25th of April, 1885, the appellee did not himself purchase his ticket to go to Orlando, but had a friend purchase it for him, stating at the time that he had reasons for doing so, which he would give at another time; that the appellee entered the cars of the railroad company wearing the uniform cap of purser of the said steamer Chesapeake; that he entered the cars of the defendant just as the train was leaving Sanford; that, shortly after leaving Sanford, the Conductor Anderson went to appellee, and informed him that he was violating a rule of the company in wearing the cap he had on, and that he had orders to put him off the train if he did not take off the cap, and asked the appellee if he would do so, and he answered that he would not; that the conductor then stopped the train, went to appellee again, and asked him to leave the train, which appellee refused to do, and said that the conductor would have to put him off, whereupon the conductor put his hand on the shoulder of the appellee, and started to lift him out of the seat, but the conductor found that appellee had fastened his feet under the seat just in front of him, whereupon the conductor called to his assistance the baggage master and a brakeman, and proceeded to expell the appellee; that Rhoads still clung to the seats, and that much force was required to expel him; that Rhoads, by so resisting, was bruised in several places, and that he was somewhat lame for two or three days; that after being so ejected, and just as the train was moving off again, Rhoads sprang upon the platform of the rear car, whereupon the conductor, assisted as before, again expelled him, and held him down in the sand until the train moved off, and left him, and that Rhoads then walked back to Sanford, some four miles. There was also evidence tending to show that the appellee went on the train of the defendant expecting and hoping that he might be expelled therefrom, for the purpose of building a case of damages against the company. This

is only the substance of the evidence, but we think it sufficient to give a clear understanding of the case.

And now the question arises, how did the jury arrive at the conclusion that the appellee was entitled to \$5,000 damages? It is clear that if the appellee, at the time he was expelled from the defendant's cars, had not violated or attempted to violate any reasonable rule of the railroad company, he was entitled to damages, either compensatory or exemplary. Did the jury find that he was entitled to any compensatory damages, and, if so, upon what did they base their calculations? Wherein was it shown that from any and all causes the appellee sustained pecuniary loss to the amount of \$5,000? The evidence discloses no set of circumstances under which the appellee was entitled to \$5,000 as compensatory damages. Did the jury intend to allow the appellee exemplary damages, and, if so, upon what did they base their verdict?

Even admitting that, at the time the appellee was expelled from defendant's train, he had violated no reasonable rule of the company; that he did not intend to violate any such rule,—and then wherein was he damaged to the amount awarded him by the jury? There is nothing in the evidence to show that any indignity was shown the appellee in ejecting him from defendant's cars, further than to use force sufficient to effect his expulsion; and, in fact, it is shown that the force used in putting the appellee off the train was only so much as was necessary to accomplish that purpose.

The circuit court charged the jury upon vindictive damages as follows: "Vindictive damages are not allowed unless for acts accompanied with maliciousness brought home to the intent of the company. If the expulsion be committed with wilful violence or wrong on the part of the conductor as to the manner of putting off the train and in discharge of his duties, then exemplary damages may be given." Now, where is there any "maliciousness" shown by the evidence which was "brought home to the intent of the company?" None such is shown, and, this being the case, the verdict was contrary to the charge of the court.

The twelfth charge requested by defendant was as follows: "It is not necessary for a party who desires to test the right of a railroad company to eject him from its cars to do more than to express his dissent to such ejection, and, if such passenger resist the efforts to eject him, and receive personal injury occasioned by such resistance, and no more force was used by the agent of the company in expelling such passenger than was necessary to accomplish such expulsion, the passenger cannot recover against such railroad company for such injuries so received." This charge was given as requested, and we think the charge was proper; and,

this being the case, how did the jury arrive at their conclusion, and award the plaintiff \$5,000 damages? The testimony shows that the personal injuries received by the plaintiff in consequence of such expulsion were but slight, and it tends strongly to show that such injuries so received by the plaintiff were inflicted in consequence of his resistance to the officers of the company, and in finding as they did the jury found contrary to the charge of the court. The court refused to set aside the verdict. This was error. Reversed.

Regulations—Sufficiency of Notice.—Where a regulation of the company requires the payment of an extra charge for the privilege of travelling in certain cars and by statute it is required that "every railroad corporation must have printed and conspicuously posted on the inside of its passenger cars its rules and regulations regarding fare and conduct of its passengers," the existence of a regulation requiring the collection of an extra charge is sufficiently shown if the plaintiff testifies that the conductor pointed out to him the regulations of the company posted up in the car, and that the conductor explained to him that he was required by the regulations to collect from passengers riding in that car, an extra charge. If the plaintiff was rightfully ejected from the car for failing to pay the extra charge, the fact that the conductor had collected plaintiff's ticket and did not return it to him does not confer upon him any right to sue the company for wrongful ejection from the train. *Wright v. California Cent. R. Co.* (Cal.), 20 Pac. Rep. 740.

THOMAS

v.

CHICAGO AND GRAND TRUNK R. CO.

(*Michigan Supreme Court, November 1, 1888.*)

Passengers—Freight Trains—Regulations—Permit.—A rule that the conductors of freight trains shall not allow any persons to travel thereon as passengers without the written order of the superintendent is reasonable, and the conductor may refuse to receive, or eject any person holding a ticket which entitles him only to travel upon passenger trains.

Same—Pleading—Variance.—Where the cause of action stated in the complaint is that the conductor of a freight train wrongfully expelled the plaintiff therefrom and the evidence shows that the plaintiff had no right to travel upon the train without a permit by the superintendent of the line and that the ticket agent who sold the plaintiff his ticket promised to obtain such permit but failed to do so, the variance is fatal to the plaintiff's right to recover.

ERROR to Circuit Court, Genesee County.

Action by James B. Thomas against the Chicago & Grand Trunk R. Co. to recover damages for the wrongful expulsion of plaintiff from one of the defendant company's trains. The defendant brings error to review a judgment for the plaintiff.

Geer & Williams (E. W. Mcdaugh, of counsel) for appellant.

LONG, J.—This action was brought in the Genesee circuit court by plaintiff to recover damages claimed to have been sustained by him in being put off defendant's freight train, just east of the city of Flint, on the 3d day of September, 1887. On the trial, the plaintiff recovered judgment for \$100. Defendant brings error. Plaintiff's claim in his declaration is that on September 3, 1887, about half past ten o'clock in the forenoon, he purchased, from the authorized agent of said defendant at Flint, and paid the price demanded therefor, a ticket called a "Weeks-End" return ticket, which, by its terms, entitled him to ride upon any train he might elect, running from Flint to Port Huron upon said road on said day, on which ticket is endorsed, with a mark calling special attention thereto, "Good going on any train Saturday," said day being Saturday, as aforesaid: and said plaintiff was directed by said ticket agent of said company to get aboard a train which would be at said station at Flint in about 10 minutes, and going, as said plaintiff was informed by said agent, to the city of Port Huron, as aforesaid. That said plaintiff got aboard of said train and sat down. When about a mile and one half or two miles from said station at Flint, the conductor of said train asked plaintiff for his fare, and was tendered plaintiff's said ticket. The conductor then demanded a permit from plaintiff, and was informed that he had none, and that he needed none, as his ticket gave him especial permission to ride on all trains running from Flint to Port Huron on that day. That the conductor then became abusive, and, checking the speed of the train, he wrongfully, unlawfully and uproariously ordered plaintiff off said train. Plaintiff refused to get off, and became greatly excited, fearing a conflict with said conductor and the train men, employes of said railway company, and thereupon said conductor wrongfully, unlawfully, outrageously, and blasphemously ordered plaintiff to get off said train immediately, while it was still in motion; and said plaintiff was finally compelled to get off said train while it was still in motion, doing so only to avoid a conflict with the conductor and other employes of said company; and said plaintiff, being sick and unable to walk, was compelled, on account of his unlawful expulsion from said train, to carry his baggage back to said city of Flint; and that plaintiff was greatly injured in his mind, his body, and his general health by said wrongful expulsion, etc.

Plaintiff testified on his own behalf upon the trial, and his claim there made was that on September 3, 1887, he went to the ticket office of defendant in the city of Flint, and enquired if there was a train going to Port Huron before 7:55 on that even-

ing. Being advised by the station agent that there was, he called for and purchased a weeks-end return ticket to Port Huron. That this was on Saturday. After purchasing and paying for said ticket, the station agent then said to him: "All I have to do is to give the conductor of this freight train a permit, and make her a passenger train. I am going to give the conductor a permit." Plaintiff testified further that he then left the depot, went outside, and waited about three-quarters of an hour, when the train came along. That another commercial travelling man was with him. That they then saw the conductor, boarded the train, left their baggage, went out for a lunch, and, on their return, the conductor, standing on the back of the car, beckoned them to hurry up. That they then got into the car, and the train started. After the train had got under way, the conductor came and demanded their tickets, which were given him, and he then asked for the permits. They then told the conductor the station agent said he would give the conductor permits for them to ride on this train. The conductor said they could not ride. Plaintiff then testified: "I told him I would ride with him. I had bought that ticket, and paid for it, and was going to Port Huron. The conductor said we could not ride, checked the train down, and ordered us off. We got off about one-half mile from the depot." Upon his cross-examination, the plaintiff was asked: "*Question.* Why didn't you ask the conductor if the agent had given him a permit? *Answer.* Because it was not my place to. *Q.* Didn't you want to know? *A.* I bought my ticket from the official of the road, from the agent, and he told me—I had a right to rely upon what the agent told me—that the ticket was a first-class ticket on that train; that I could ride on that train. The agent told me he would give the conductor a permit. I told the conductor what the agent told me about giving him a permit. The conductor told me he could not carry me if I didn't have a permit. He told me I would have to get off that train. *Q.* Did he not tell you, according to the rules and regulations of the company, no man could ride on these through freights without a permit? *A.* Yes, sir." It further appeared from the plaintiff's testimony that after being put off this time, and returning to the depot, he saw the operator, who told him another through freight would be along in a few minutes, when a permit would be got for him, and he could ride upon that to Port Huron. Plaintiff refused this offer, and demanded that he be given a permit, and put on a yard-engine standing there, and carried over the road till the train from which he had been ejected was overtaken, and then put aboard that train, and permitted to ride to Port Huron.

It will be seen the claim made in the declaration is that the conductor wrongfully and unlawfully ejected him from the train

upon which he lawfully might ride, for the reason that he had a ticket good on any train; charging the defendant with the misconduct of the conductor in unlawfully ejecting him while he was in possession of a ticket which entitled him to ride on that train. His declaration is formed upon the theory that his ticket entitled him to ride on the through freight train without a permit, and that the conductor wrongfully compelled him to get off. The ticket was produced on trial, and read as follows: "Chicago & Grand Trunk Railway. Weeks-End Excursion Ticket. Mr. J. B. Thomas. From Port Huron to Flint. Only for one continuous trip each way, and is not transferable. Good going on any train Saturday, September 3, 1887, and return not later than Monday, September 5, 1887. It will not be good to return on date of issue. This ticket will not be good for return passage unless presented by the person whose signature appears below, and unless the purchaser's signature is reproduced in the presence of the conductor in space provided on back hereof. No stop-over allowed. W. J. SPICER, General Manager. I fully understand and agree to the above contract. [Signed] J. B. THOMAS. Form C—X—20. Chicago & Grand Trunk Railway. Weeks-End Excursion Ticket. From Flint to Port Huron, on conditions named in the contract. Not good if detached. Form C—X—20." It appeared upon the trial that the defendant company had adopted a rule, No. 167, which was in force on September 3, 1887, and which reads as follows: "No conductor in charge of a freight train shall receive or take a fare from any person travelling on his train, nor shall he allow any person to travel as a passenger without the written order of the superintendent or assistant superintendent in charge of the district, except such way freight trains as are printed in time tables." The train from which plaintiff was put off was No. 27, and a through freight. It was not on the published timetable. It was not a train that carried passengers without a permit, such as is provided for in the above rule. These facts were known to the conductor at the time he put plaintiff off the train. This ticket did not entitle the plaintiff to ride on the train in question. It was not a way freight, and was not printed in the time tables as a train upon which passengers would be carried. The rule adopted by the company was a reasonable one, and within their power to prescribe.

The ticket held by plaintiff only entitled him to ride upon passenger trains. The words in the ticket, "Good going on any train Saturday, September 3, 1887," had reference to trains used in the carriage of passengers, and the permission to ride on a through freight could only be granted by the superintendent or assistant superintendent in charge of the district. This permis-

**Rule
requiring
permit to
travel on
freight
train.**

sion the plaintiff did not hold, and it is not pretended that any such permit was given. The defendant company had the right to prohibit passengers from riding on freight trains, or to prescribe the conditions on which they might so ride. *Burlington & M. R. Co. v. Rose*, 8 N. W. Rep. 433. It was the duty of the conductor to cause a passenger to leave the train if he was attempting to ride without having obtained the permission of the superintendent or assistant superintendent in charge of the district, and the conductor is not to be governed in his action by any arrangement the passenger claims to have made with the ticket agent, under the circumstances here shown. The defendant was not bound by any law, statutory or otherwise, to carry passengers on its trains for the transportation of freight. The plaintiff's right to ride upon the train in question could only be acquired by complying with rule 167. No pretence is made that he has done so, and the fact that the station agent of defendant promised to give the conductor the permit does not aid the cause set out in his declaration. *Marquette, H. & O. R. Co., v. Railroad Co.*, 37 Mich. 343; *Marshall v. St. Louis, K. C. & N. R. Co.*, 78 Mo. 616; *Indianapolis & St. L. R. Co. v. Kennedy*, 3 Am. & Eng. R. R. Cas. 467.

The cause of action set out in the declaration, however, is not the cause of action upon which plaintiff prevailed at the trial.

The declaration was framed upon the theory that he had a right to ride upon a through freight train without a permit, and he bases his right to recover on the assumption that the conductor wrongfully expelled him. The claim made upon the trial was that the ticket agent agreed, when he sold him the ticket, that he would give the conductor a permit for him to ride upon that train, and that the station agent directed him to take that train, and that he did take it because of the direction so given by the station agent. The station agent positively denies giving any such direction, but says he sold him the ticket, and told him he would try and get him a permit to ride on that train, and he must come to the station and get it before the train left. That he had to telegraph to Battle Creek, to the assistant superintendent, for it. No claim is made by plaintiff that he did call upon the station agent after purchasing his ticket to get the permit, but he claims that he relied upon the agent giving such permit to the conductor. The court, upon this testimony, charged the jury that "that ticket produced in evidence is a ticket for a transit on a passenger train, and under this ticket alone the plaintiff would have no right to travel on a freight train. It could only be used by the direction and permission of the railway company, given by Mr. Dowker, its agent, and a special contract to do so, agreed to by both parties. I further charge you that the burden of proof is on the plaintiff to satisfy you, by a preponderance of evidence, that the agent

Pleading—
Variance.

directed him to take that train, and to use this ticket thereon; and, if you are so satisfied, you will find for the plaintiff." The case was submitted to the jury upon this theory, and upon no other. This was not the claim made by the declaration. It is well settled that one cannot sue for the breach of one duty, and recover for the breach of another. Plaintiff alleges in his declaration that the ticket agent told him to get aboard the freight train, but makes no claim that such direction was not correct and proper, but, on the contrary, asserts that it was, and that no one was in fault but the conductor. On the trial the case was submitted to the jury on the theory that the agent did misdirect him, and sold him the ticket with the agreement that he could ride on that train with the ticket then purchased. In the declaration the allegation is that the conductor was in fault. On the trial the claim is made that the station agent was in fault. This was a fatal variance, and the plaintiff had no right to recover.

Defendant's counsel requested the court to charge the jury in his fourth request that "the conductor on the train in question had the right to require the plaintiff to procure and produce, when requested, a permit from the proper officer of the defendant company, entitling him to a passage on said train, and, upon plaintiff's failing and refusing to procure and produce the same when requested to do so by the conductor in charge of said train, said conductor had the right to insist that the plaintiff should get off from said train, and for which expulsion from said train the defendant in this cause is not liable." This request was a proper one, and, under the circumstances here stated, should have been given by the court. The claim set out in the declaration had not been substantiated by the proofs; and the conductor, as found and as charged by the court, was in no fault. The ticket itself did not entitle plaintiff to be carried there. No permit was produced, and plaintiff was properly expelled from the train. If he had a cause of action against the company for a breach of contract in the purchase of his ticket, made with the station agent, he should have so stated in his case in his declaration. Not having so stated it, he was not entitled to recover under this declaration.

The judgment of the court below must be reversed, with costs, and a new trial ordered. The other justices concurred.

PEAVY

v.

GEORGIA R. CO.

(Georgia Supreme Court, December 3, 1888.)

Passengers—Disorderly Conduct—Expulsion.—With or without a ticket, a passenger has no right to remain on a train and be carried when he is disorderly, or uses any obscene, profane or vulgar language.

Same—Liability of Company for Injuries.—If a disorderly passenger defies the conductor, draws a pistol and thereby induces the conductor to arm in order to expel him from the train, and if after expulsion he still uses grossly obscene and profane language, reeking with insult, on which a mutual combat with pistols ensues, the railroad company is not liable for the consequences, though the expelled passenger be wounded in the conflict, even if the conductor, excited by danger and irritated by insult, be not fully excusable for the shooting. It is unjust to a master wrongfully to unfit his servant for exercising the care and prudence which are essential in guarding the master's interest and performing the servant's duty.

ERROR from Superior Court, Warren County.

Action to recover damages.

Thos. E. Watson, Jas. S. Battle, J. S. Gross and J. W. Hickson for plaintiff in error.

J. B. Cumming, W. M. & M. P. Reese and James Whithead for defendant in error.

BLECKLEY, C. J.—The plaintiff sued upon two causes of action: (1) Expulsion from the cars; and (2) the shooting of him by the conductor. There have been two trials. In the first he obtained a verdict of \$1,500; in the second for \$2,250. The presiding judge, on each occasion, set aside the verdict, at the instance of the defendant, and granted a new trial. The second grant of a new trial is what we are now called upon to review.

1. The code, § 4586a, declares that "when a passenger is guilty of disorderly conduct, or uses any obscene, profane or vulgar language, . . . upon any passenger train, the conductor of such train may stop his train at the place where such offense is committed, or at the next stopping place of such train, and eject such passenger from the train, using only such force as may be necessary to accomplish such removal; and the conductors may command the assistance of the employes of the company and of the passengers on such train to assist in such removal." The plaintiff, with several drinks in his bosom and a pistol in his possession, got upon a passenger train, and the first thing he did on reaching the platform was to use profane language. The conductor, being near by,

and hearing him, approached, and either took him by the collar, or touched him by the shoulder, and admonished him not to swear. They had some conversation, and the plaintiff, with the conductor's assent, went into a car, and took a seat. While there, the conductor coming in for the purpose of collecting fare or taking up tickets, the conversation between them was renewed, in which the plaintiff again cursed and used obscene language. According to the weight of the testimony (and to anyone not under the sway of interest or the spell of eloquence it is plain what the truth of the case is), he was profane, obscene and disorderly, and upon the conductor trying to put him off the train, he drew a pistol. He had already said that if the conductor attempted to put him off they would see which one "hit the ditch" first. The conductor retired, borrowed a pistol from a passenger (a sheriff on board who had a prisoner in custody) and then came up and presented his pistol, forced the plaintiff to lower his hand, and backed him off the train. When the plaintiff reached the ground, the conductor shook his pistol in his face and told him that if he got on the train any more he would get hurt. If nothing else had occurred there would have been no shooting. The conductor, up to this point, was unquestionably justifiable in what he did. But the plaintiff, after being expelled from the train, and being thus admonished by the conductor, replied with grossly vituperative obscenity and profanity. His expression, as he repeats it himself, in the evidence, is too foul and repulsive to be reproduced in this opinion. The moment he gave this filthy insult the conductor shot at him, hitting him on the shoulder, and about the same time the plaintiff shot at the conductor, and they exchanged five shots, the conductor hitting three times, and not being hit at all. According to the plaintiff's witness, Hill, after the shooting was over the plaintiff walked up, and said to the conductor if he got off the train he would whip him. The conductor went back in the car to get another pistol, and while he was endeavoring to do so someone pulled the bell rope and the train moved off. The plaintiff, however, as it moved off, attempted to board it again, and his witness, Hill, pushed him off, telling him that if he got on the conductor would kill him. The last seen of him was by a passenger, as the train moved away, standing upon the track waving his pistol. There can be no doubt that his use of profane and obscene language and his disorderly conduct generally, warranted the conductor in expelling him from the train. He certainly had no cause of action for that.

2. Did he have a cause of action for the shooting? But for his fault the conductor would not have been brought into a state of excitement from danger and insult, which unfitted him for discharging his proper duties, either to the company or to the passenger. Whether the conductor was more or less in fault than

the plaintiff was in the shooting, certainly the plaintiff was more in fault than the company; because the plaintiff was there upon the ground, stirring up excitement and bringing on danger both to the conductor and himself. He unfitted the conductor for exercising the care and prudence that were essential to guarding the interest of the company, and essential to performing in a proper manner his duty to the company or to the plaintiff. The plaintiff spoiled the instrument, and then sued the manager because the performer did not make good music. It was the plaintiff's fault that the conductor was out of tune; and though the conductor might not be altogether excusable for the shooting (according to his own evidence however, he was excusable), the company was in no fault for it, and it would be unjust for the plaintiff to recover of the company, when he boarded its train, violating the law (as we can well infer), by carrying upon his person a concealed weapon, violating the law again by swearing and using obscene language, violating the law again by committing an assault upon the conductor with a pistol, drawing the pistol and presenting it at him and violating the law by general disorder and misconduct throughout the transaction, up to the moment he was shot. We think the court below was well warranted in granting the second new trial. While a second verdict is a sacred thing, it is less sacred than the law and the substantial justice of the case. These required that another new trial should be granted.

Judgment affirmed.

Expulsion of Disorderly Passengers.—The conductor of a passenger train has full authority to summarily expel any passenger guilty of disorderly and lawless behavior. Accordingly, where a drunken passenger on a train, by violent and indecent language frightened his fellow passengers and menaced the conductor with an open knife, and finally rang the bell to stop the train, the conductor was justified in ejecting him at the place where the train then was, and if he is run over and killed by a later train, the company is not liable for his death, if there was no fault on the part of those in charge of the train which killed him. The right of the conductor in such circumstances to expel the passenger is not affected by the fact that he was improperly allowed to board the train as a passenger. *Louisville & Nashville R. Co. v. Logan* (Ky.), 10 S. W. Rep. 655.

Statutory Authority to Arrest Disorderly Persons.—The provision of the Massachusetts statute (Mass. Pub. St., c. 103, § 18) that railroad police officers may arrest a noisy or disorderly passenger without a warrant and remove him to the baggage or other suitable car and confine him there until the train arrives at some station, where such passenger can be placed in charge of an officer, who shall take him to a place of lawful detention, was intended to confer additional powers upon the officers of the railroad, who are appointed railroad police officers, and does not take away the common law right of the railroad corporation, by its servants and agents, to remove a passenger who is noisy and disorderly to the annoyance of the other passengers. Accordingly, when the conductor of a train removed a passenger from the car in which he was travelling because he was drunk and disorderly and annoyed the other passengers, and carried him in the baggage car to his destination without intending to arrest him, such passenger has no right of action for any assault committed upon him by the conductor, if

only the necessary degree of force was used. *Sullivan v. Old Colony R. Co.* (Mass.). 18 N. E. Rep. 678.

Expulsion of Intoxicated Passengers.—See note, 21 Am. & Eng. R. R. Cas. 428.

CONOLLY

v.

CRESCENT CITY R. CO.

(*Louisiana Supreme Court, December 3, 1888.*)

Passengers—Ejection of Sick Person—Duty of Carrier.—Although a common carrier of passengers owes obligations to its well passengers as well as to those who are sick, and is bound to protect the rights of both, and although when the condition of one passenger, from sickness or otherwise, is such as to be inconsistent with the safety, health, or even reasonable comfort of his fellow-passengers, regard for the rights of the latter will authorize the carrier to terminate the carriage by excluding him, yet this right cannot be exercised arbitrarily and inhumanely, or without due care and provision for the safety and well being of the ejected passenger.

Same—Abandonment on Street.—A passenger stricken with apoplexy while riding on a street car, although attended with severe vomiting, to the inconvenience and great discomfort of other passengers, cannot be removed while in a speechless and helpless condition, and laid in the open street, on a bleak, drizzling December day, and there abandoned, with no effort to procure him attention, without a gross violation by the carrier of its duty as such, and liability for resulting damage.

Same—Mistake of Driver—Apoplexy—Drunkenness.—The mistake of the driver in supposing that the passenger was drunk, when the latter had ridden a considerable distance without misbehavior, and had been guilty of none except the vomiting occasioned by his illness, cannot excuse the company.

Same—Duty of Carrier—Degree of Care.—The defence admits the absence of any attempt whatever of the company to perform its duty of seeing to the care of the ejected passenger, and rests upon a denial of any such duty in the premises. Hence the kind and degree of the care to be exercised under the peculiar conditions which attend the operation of street railways in New Orleans are not involved.

APPEAL from Civil District Court, Parish of Orleans.

Action by Mrs. Catherine Conolly against the Crescent City Railroad Company, to recover damages for negligently leaving her husband, who was stricken with apoplexy, and ejected from the car in a helpless condition, to lie and suffer in the street.

J. M. Bonner for appellant.

Wilkinson & Armstrong and *W. F. Ogden* for appellee.

FENNER, J.—On a Sunday in December, at about 2 o'clock of the afternoon, Patrick Conolly, a sober, respectable citizen of 55 years, entered a car of the defendant's street railway, and paid his

fare as a passenger. Nothing in the evidence indicates that he exhibited any sign of intoxication, or was guilty of the slightest impropriety of behavior, on entering the car, or until he had ridden

Facts. a considerable number of squares (from Terpsichore to Third street), and the testimony is conclusive that, in point of fact, he was perfectly sober. After passing Third street he was suddenly stricken with apoplexy, accompanied, as the medical experts prove to be common, with severe vomiting. The car had numerous passengers to whom this vomiting undoubtedly occasioned serious discomfort and inconvenience. Some of them left the car on account of it, while others of those remaining suggested that he should leave the car, and took steps to call the attention of the driver to the necessity of removing him. The sick man had sufficient consciousness and sense of propriety left to observe this, and he said, "I will get out myself;" but, in rising to do so, he fell prone upon the floor, where he lay absolutely helpless. As far as appears, he never spoke again, and was incapable of taking any care whatever of himself. The driver then came back, and, with the assistance of a passenger, bodily lifted him, carried him out of the car, and laid him down in the street between the car track and the gutter, between two and three feet from the former. The evidence is conclusive that, almost immediately afterwards, and while the car was moving off, he shifted his position, by some convulsive movement, so that his legs were across the rail of the track. This is proven by passengers who saw him in this position as the car moved away, and by others who came to him immediately afterwards. The driver, however, after thus summarily disposing of his stricken passenger, paid no further attention whatever to the matter. He took no steps to secure for him any relief or assistance. It is doubtful if he made any report of the incident to his employers, and, if he did, it was not acted upon. He simply went his way in a serene confidence that, as he expresses it, he had "done his duty," and, although he passed the point several times while his ejected passenger was still lying helpless on the adjoining sidewalk, he states that he does not recollect whether he saw him or not. A female passer by, observing his perilous position across the track, went to his assistance, and, with the aid of a gentleman, removed and laid him on the sidewalk. Here he remained for more than four hours, on a bleak, drizzling December day, in the open street, without aid or relief in his terrible condition. At last the police authorities came to his assistance, and he was conveyed to the Charity Hospital, where he died on the following morning.

It should need no parade of learned authorities to maintain the proposition that a common carrier cannot treat an unfortunate passenger, stricken with apoplexy while under its charge, in the manner above indicated, without a breach of the plainest

obligations of its contract of carriage. If there were any precedent to the contrary, humanity would revolt at it, and it would be one "more honored in the breach than the observance." But there is no such precedent, and those cited by defendant's counsel are far from sustaining their position. No doubt a carrier owes obligations to its well passengers as well as to sick passengers, and is bound to protect the rights of both. When the condition of a sick passenger is such that his continued carriage is inconsistent with the safety, or even the reasonable comfort, of his fellow-passengers, regard for the rights of the latter will authorize the carrier to exclude him from the conveyance. Thus if he had cholera, or small-pox, or *delirium tremens*, or even if, as in this case, he were subject, from any cause, to continuous vomiting, utterly inconsistent with the comfort of other passengers in a street car, the right of the carrier, in protection of the latter's privileges to exclude him would undoubtedly arise. Such is the reasonable doctrine of the cases cited. *Lemont v. Washington & G. R. Co.*, 47 Am. Rep. 238; *Vinton v. Middlesex R. Co.*, 11 Allen (Mass.) 304; *Murphy v. Union R. Co.*, 118 Mass. 228; *Atchison, T. & S. F. R. Co. v. Weber*, 33 Kan. 543; *New Orleans & G. N. R. Co. v. Statham*, 42 Miss. 607.

Sick passenger—Duty of carrier.

But none of these cases hold that this right of exclusion may be exercised arbitrarily and inhumanely, or without due care and provision for the safety and well being of the ejected passenger. On the contrary, the duty of exercising such care and provision is universally recognized. Thus, in the Kansas case above quoted, the court said: "Under these facts, the propriety of his removal cannot be doubted. The duty of the railroad company, however, with respect to Weber, did not end with his removal from the train. He was unconscious, and unable to take care of himself. The company could not leave him on the platform helpless, exposed, and without care or attention. It was its duty to exercise reasonable care and diligence to make temporary provision for his protection and comfort." This was a case of intoxication. And in the case most relied on (*Lemont v. Railroad Co.*) the supreme court of the District of Columbia, after recognizing the right of removal, is careful to add: "Of course, for an abuse of this discretion, or for any oppression in its exercise, the company would be responsible." In another case the court, while conceding the right of ejection, said: "It does not follow that the right may be exercised in such manner, under such circumstances, or against a person in such mental or physical condition, as that death or serious bodily harm will necessarily, or even probably, result from putting him off." *Louisville, C. & L. R. Co. v. Sullivan* (Ky.), 16 Am. & Eng. R. R. Cas. 390. See also *Hall v. South*

Provision for care and safety of passenger

Carolina R. Co. (S. C.), 5 S. E. Rep. 623 (March 1888); Lovett v. Salem & S. D. R. Co., 9 Allen (Mass.), 557; Higgins v. Wateroliet T. R. Co., 46 N. Y. 23.

We conclude, therefore, that the conduct of the defendant's agent in turning out this helpless and speechless sick passenger into the roadway of the street, and there leaving him **Justification—** on an inclement day, without the slightest attempt, at **Supposed** the moment or afterwards, to have him taken care of, **intoxication.** was a gross violation of its duty. The company attempts to shield its agent on two special grounds, viz :

1. That he supposed, and appearances justified him in supposing, that Conolly was drunk. Even if his illness had been the result of drinking, yet he had ridden a considerable distance without misbehavior, and was never guilty of any, except in the sudden excess of vomiting, bringing about a condition of complete helplessness. In such case, the duty of the company to see to his being taken care of, after ejection would have arisen, and would have been abridged by no fault on his part, because, until his sickness, he had been in fit condition to take passage, and had committed no voluntary misbehavior. Moreover, it is admitted that Conolly was not under the influence of liquor, and the assumption that he was so was a rash one, under the circumstances, and the company, not Conolly, must suffer for the mistake.

2. It is claimed that Conolly had signified his desire, and had attempted to get out, and that the driver only helped him to accomplish his purpose. That he wished to get out while he thought he was able to do so, and to take care of himself, may be true; but to suppose that he desired to be put out, and left in the street after he had fallen down in an utterly helpless condition, is too preposterous to merit consideration. We are not here concerned with the measure of the duty which a street railway company, operated under the conditions prevailing in the city of New Orleans, owes to a passenger in such unhappy case, nor with the kind or degree of care which it is bound to take for his protection. If we were, we should give due consideration to such conditions, and would be careful to adjust the duty according to practicability. But the defence here rests upon the entire absence of any effort whatever to perform the duty, and a denial that any duty arose in the premises. Such a defence can receive no sanction at our hands.

Nothing remains for determination but the measure of damages. The cause of action arose prior to the recent amendment of article 2315, Rev. Civil Code and the damages **Damages** recoverable are those only which were suffered by **held exco-** Conolly. The case was tried twice before a jury. The **sive.** first verdict was for \$1,500, on which a new trial was granted. The second verdict, from which the present appeal is

taken, was for \$2,500. The evidence indicates that Conolly was not entirely deprived of consciousness, but his faculties were, no doubt, greatly obtunded. His sufferings were severe, and, though he must have suffered in any event, it would be a reproach to medical art to suppose that it could not have found means to alleviate them had he received proper attention. The medical testimony indicates that the attack was necessarily fatal. The humiliation of his position was extreme, and it is probable that he felt that to some extent, because one witness states that when asked if he was drunk, he shook his head. On the whole, considering all the circumstances, we consider that an award of \$1,500 will do justice.

It is therefore ordered and decreed that the judgment appealed from be amended by reducing the amount thereof to \$1,500, and that, as thus amended, the judgment appealed from be affirmed; plaintiff to pay costs of appeal.

Removal of Passenger Suffering from Infectious Disease.—If the officers in charge of the train have reason to believe that a passenger is suffering from small-pox, it is their duty to remove him in order to protect the other passengers and they are justified in doing so, although the disease from which the passenger is suffering should prove to be of another kind altogether. But in removing such passenger, the company must put him off the train at some place where he can find accommodations or where there is reasonable ground to believe that he can find accommodations. Where a passenger under such circumstances is wrongfully expelled, the measure of damages is the money he has paid out necessarily in expenses, the value of the time he has lost by reason of his detention and compensation for the pain and suffering which he endured subsequent upon his removal. *Paddock v. Atchison, Topeka & Santa Fe R. Co.*, 37 Fed. Rep. 841.

Removal of Delirious Passenger.—See *Atchison, T. & S. F. R. Co. v. Weber*, 21 Am. & Eng. R. R. Cas. 418.

CHICAGO, ST. LOUIS AND PITTSBURGH R. CO.

v.

BILLS.

(*Indiana Supreme Court, April 5, 1889.*)

Limitation of Actions—Personal Injuries—Amendment of Complaint.—The complaint originally filed in an action sought to recover for injuries sustained by the plaintiff through being wrongfully expelled from the defendant's car. An amended complaint, filed after the statutory period of limitation had run, counted upon a right to recover for injuries suffered by being expelled from the train with unnecessary force. *Held* that notwithstanding the fact that the amended complaint was filed after the statutory period, the plea of the statute of limitation was not available.

Passenger—Person Wrongfully on Train—Expulsion—Unnecessary Force.—Where the plaintiff sues to recover damages for the use of unnecessary force in

expelling him from the train, the fact that he was wrongfully upon the train constitutes no defence, and the question of contributory negligence on his part cannot, therefore, enter into the case, the injury sued for being intentional in its nature.

Same—Evidence—Materiality.—In such a case evidence that the ticket agent from whom the plaintiff purchased his ticket, informed him that the train upon which he was travelling would stop at his destination is immaterial, as the defendant's negligence in entering the train has no bearing upon the case.

APPEAL from Circuit Court, Madison County.

The case is stated in the opinion.

N. O. Ross for appellant.

Robinson & Lovett for appellee.

MITCHELL, J.—Bills sued the railroad company, and charged in his complaint that he had sustained grievous injuries to his person, by being expelled from one of the company's passenger trains with unnecessary force. The case was tried upon an amended complaint, and the plaintiff had judgment upon the special verdict of a jury. The defendant pleaded the statute of limitations, alleging in his plea that by the original complaint, which had been filed within two years from the date of the alleged injury, the plaintiff sought to recover for injuries sustained to his person and property while being wrongfully expelled from the defendant's cars; that the complaint to which the plea was filed counts upon a right to recover for injuries suffered by being expelled from the train with unnecessary force; and that the amended complaint was not filed within two years from the date on which the cause of action therein mentioned accrued. The court committed no error in sustaining a demurrer to the plea. An amended complaint has relation ordinarily to the date of the commencement of the action, and is regarded as a matter occurring in the continuation or progress of the original cause. Unless, therefore, some new claim or title not previously asserted is set up by way of amendment, a plea of the statute of limitations will be determined with reference to the date when the action was originally commenced. *School Town v. Grant*, 104 Ind. 168. *Evans v. Nealis*, 69 Ind. 149. See *Sidener v. Galbraith*, 63 Ind. 89, and cases cited.

Conceding the rule to be substantially as above enunciated, it is contended on the appellant's behalf that the answer was sufficient nevertheless, because the argument in the amended complaint sets up a claim or cause of action not previously asserted. We do not concur in this view. Both complaints involve the same transaction; the *gravamen* or substantial grievance complained of in both being the personal injury suffered by the plaintiff in being ejected from the defendant's train. The original complaint proceeded upon the theory that the plaintiff sustained an injury to his person by being wrongfully expelled from a train on which he

had a right to be. The amended complaint is predicated upon the same transaction and injury, but proceeds upon the theory that the plaintiff may have been wrongfully or carelessly on the train, and that he was ejected therefrom with unnecessary force, to his injury. The first complaint was more comprehensive than the last, and embraced elements of damage which were not in the amended complaint; but the last embraced nothing that was not covered by the first.

It is next contended that the court erred in rendering judgment in favor of the plaintiff below on a special verdict returned by the jury. This contention rests upon the proposition that it is neither directly nor inferentially found that the plaintiff was without contributory fault on his part. The doctrine of contributory negligence is not relevant to a case like the present, and parties must be consistent with the theory on which their case proceeds, let the consequences fall where they may. As we have seen, the action is to recover damages for injuries alleged to have been sustained by the plaintiff in being ejected from the defendant's train with excessive force and violence. Such an act is essentially unlawful. It is equivalent to an assault and battery, and no degree of carelessness on the part of the person assaulted furnishes any excuse for an unlawful invasion of the right of personal security. Beach, Contrib. Neg. § 22. Contributory negligence is no defence against an intentional wrong. Every railroad company is bound to take notice of the liability of persons about to become passengers to board the wrong train, either by mistake or through ignorance or neglect. Instead of subjecting such persons to needless violence, it is the duty of the company to afford them all reasonable protection, and, while no one is entitled to remain on a train in defiance of the rules and regulations of the company, its duty is to stop its train at some suitable place, and use all reasonable precautions in affording one thus situated an opportunity to alight therefrom in safety. *Cincinnati H. & I. R. Co. v. Carper*, 112 Ind. 26. *Rounds v. Delaware etc. R. Co.*, 64 N. Y. 129.

It appeared in evidence that the plaintiff, desiring to be carried from Elwood to Curtisville, a distance of about six miles, purchased a ticket, and entered upon one of the company's through trains, which, according to the published schedule, did not stop at the station last named. When he exhibited his ticket to the conductor he was informed by the latter that the train did not stop at the place to which he was destined, and that he must either pay his fare to a station beyond, or that the train would be stopped there, and he could get off. The plaintiff chose the latter alternative, but claims that the conductor inflicted unnecessary and unlawful violence upon him while alighting from the train.

The plaintiff was permitted to testify, over objection, that before purchasing the ticket at Elwood he enquired of the ticket agent whether the train would stop at Curtisville, and that he was informed that it would, and that he thereupon purchased his ticket, and got upon the train when it arrived. This evidence could only have been admitted for the purpose of showing that the plaintiff was not a trespasser, or that he was not guilty of negligence in entering upon the train from which he was expelled. As we have already seen, there was no question of negligence or contributory negligence in the case. It was an action for an unlawful invasion of the plaintiff's right of personal security, and proceeded upon the correct assumption that he was entitled to recover for injuries sustained by being ejected from the train with needless violence, even though he was upon the train without right. It was therefore wholly immaterial to any issue in the case to prove that he had acted with proper care in entering upon the train, or that he was brought into the situation in which he was found by the mistake of the ticket agent. While a passenger has a right to rely upon information received from a ticket agent when purchasing a ticket, as to matters relating to the places where the train upon which he desires to embark will stop, and to recover from the company all resulting damages in case he is misled without his own fault, he has no right to remain upon a train without paying additional fare, or contrary to the rules of the company, after he has been notified that the train will not stop, according to the information received from the ticket agent. The conductor cannot be required to deviate from the rules under which he is compelled to run his train, nor to run his train except in conformity to the schedule which the law requires should be posted up for the information of all, upon the statement by a passenger of information received from a ticket agent. *Pittsburgh, C. & St. L. R. Co. v. Nuzum*, 60 Ind. 533; *Henderson v. Sherman*, 47 Mich. 269; *Yorton v. Milwaukee, L. S. & W. R. Co.* 54 Wis. 234; 6 Am. & Eng. R. R. Co. 322; *Railway Co. v. Bills*, 104 Ind. 13.

The passenger's right to recover damages which he may have sustained by being misled by the ticket agent is a right of action altogether different and distinct from one which arises out of an assault and battery committed upon him by the conductor in ejecting him from the train with needless violence. If the plaintiff was damaged by the misinformation negligently communicated to him by the defendant's ticket agent, he has his right of action for that yet, and it was therefore prejudicial error to permit him to prove the negligence of the ticket agent, and get the benefit of that element in the present case, while the defendant was deprived of any right to insist that the plaintiff was guilty of contributory negligence. If the question had been upon the com-

pany's negligence, arising out of the conduct of its ticket agent, then the doctrine of contributory negligence would have been applicable. Possibly the plaintiff was negligent in not looking at a train schedule, which may have been at hand, or he may have known, for all that appears in this case, that the train did not usually stop at Curtisville.

It cannot be said that the evidence was harmless. This is only another application of the rule that a party will be bound by the theory upon which his case proceeds through all its stages.

The judgment is reversed, with costs.

Statute of Limitations—Amendment of Complaint.—The petition in an action by husband and wife stated facts on which both husband and wife sought a recovery. There was nothing in the petition which characterized the action as one brought to recover in the separate right of the wife. The petition was demurred to on the ground of misjoinder of parties, but the demurrer having been sustained, the name of the wife was dropped from the case. *Held* that, notwithstanding the fact that the statutory period of limitation had elapsed before the amendment, the husband might prosecute the action, no change having been made in the cause of action relied upon in the original petition. *Missouri Pac. R. Co. v. Watson (Tex.)*, 10 S. W. Rep. 731.

Expulsion of Passenger—Liability of Company.—When the relation of carrier and passenger exists, the acts of the carrier's servants in wrongfully putting the passenger off the train is a violation of the duty to safely carry him for which the carrier is liable. *Cain v. Minneapolis & St. Louis R. Co. (Minn.)*, 39 N. W. Rep. 635.

Same—Sale of Non-transferable Ticket.—If a passenger sells or disposes of a non-transferable ticket, or is unable to exhibit his ticket within a reasonable time after being requested to do so by the conductor, and refuses to pay the usual fare for the balance of the trip, the conductor is justified in ejecting him from the train, providing he does not abuse or insult the passenger, or use unnecessary force of violence. A father travelling upon a train is not responsible for the acts of his son over 21 years of age, who is also a passenger, and the fact that the son sold his ticket does not justify the conductor in ordering the father to leave the train or ejecting him from it. Where the plaintiff in an action to recover damages for being wrongfully expelled from a train, testifies that he had not sold or given his ticket away on the train, and that it was in his possession when he left the train, he may competently be asked on cross examination, what became of the ticket. *Louisville & Nashville R. Co. v. Maybin (Miss.)*, 5 S. Rep. 401.

Same—Measure of Damages.—An instruction in an action to recover damages for forcibly ejecting a passenger from a train to the effect that "where a passenger is wrongfully compelled to leave a train and suffers insult and abuse, the law does not exactly measure his damage, but it authorizes the jury to consider the injured feelings of the party, the indignity endured, and humiliation, wounded pride, mental suffering, and the like, and to allow such a sum as the jury may say is right," does not authorize the allowance of punitive damages, but only of actual compensation for the injury sustained. *Shepard v. Chicago, Rock Island and Pacific R. Co. (Iowa)*, 41 N. W. Rep. 564.

Same—Contributory Negligence.—Where, from the plaintiff's testimony, it appears that he jumped from a train while it was running at the rate of 10 or 12 miles an hour, and the record does not disclose any evidence tending to show that he had reason to believe that he would have suffered any bodily harm on the train, or that he would have been ejected by force while the train was in rapid motion, if he had not gone voluntarily, his attempting to leave the train under such circumstances was wanton and reckless, and the company is

under no liability for any injuries sustained by him. *St. Louis, Iron Mountain & Southern R. Co. v. Rosenberry* (Ark.), 11 S. W. Rep. 212.

Same—Explanation by Passenger—Offer—Pleading.—An allegation in a complaint to the effect "that the plaintiff explained the case to the said conductor, telling him that he knew where his ticket was; that he could and would get it as he reached Winfall, and there deliver it to him, or that he would deposit with him, the said Poindexter, money of the value of the ticket, to be returned if he should produce the misplaced ticket at Winfall, as agreed; that the money was tendered the said conductor, but he refused to receive the same and forced the plaintiff off the train several miles from his destination," sufficiently sets forth that an offer was made by the defendant, to deposit the value of the ticket or the usual fare between the two points named upon condition that the conductor should take it as a pledge and return it if the ticket should be produced, and (2) that upon the refusal of the conductor to accept the conditional offer, an unconditional offer of the payment of the fare was made. An allegation in such a complaint that the conductor "forced the plaintiff off the train" and that he was "put off," together with the further allegation that "by said wrongful act of ejecting the plaintiff from said train," etc., conveys the idea that actual violence was used, under which the plaintiff might offer evidence of violence on the part of the conductor, and the court might properly instruct the jury as to its right to recover punitive damages. *Knowles v. Norfolk S. R. Co.* (N. Car.), 9 S. E. Rep. 7.

Same—Unnecessary Force.—In an action to recover damages for wrongful ejection from a train, it appeared that the plaintiff had no right to travel in the car in which he was and that he was rightfully expelled. His testimony showed that he caught on to the rail of the platform and resisted the efforts to remove him. *Held* that, as the force used toward him was exercised for the purpose of overcoming his resistance, and it was not shown that any greater force was used than was necessary, he could not recover for injuries sustained while being removed. *Wright v. California Cent. R. Co.* (Cal.), 20 Pac. Rep. 740.

Same—Punitive Damages.—In an action to recover damages for expulsion from a passenger train, the evidence showed, that the conductor refused to accept plaintiff's ticket and told him that if he did not pay his fare he would "bounce" him from the train. The plaintiff having refused to pay fare, the train was stopped, and the conductor and brakeman took hold of plaintiff and forced him rather violently to the door of the car. After reaching the door the plaintiff, who had hitherto held back, made no further resistance. When going down the steps, which were icy, plaintiff caught hold of the railing but the brakeman broke his hold, and as a result the plaintiff fell and received considerable injuries. *Held*, that the evidence was sufficient to justify the court in submitting to the jury the question whether the acts of the conductor were wilful or wanton. *Pennsylvania Co. v. Connell* (Ill.), 20 N. E. Rep. 89.

BALDWIN

v.

GRAND TRUNK R. CO.

(*New Hampshire Supreme Court, July 19. 1888.*)

Passenger—Ejection—Passenger Station.—The provision of the New Hampshire statute that no person shall be ejected from a train for non-payment of fare except at a "passenger station," prohibits the ejection of any person at a place where passenger tickets are not ordinarily sold.

Action upon the case to recover damages for wrongfully ejecting the plaintiff's intestate from the defendant's train and for thereafter negligently running over him, causing his death.

The evidence showed that the intestate was ejected for non-payment of fare at a place called Beattie's Turnout. It was claimed by the defendant company that this place was a passenger station within the meaning of the New Hampshire statute, but it appeared that there were none of the usual depot buildings there, and that tickets were not sold there, nor was baggage received and checked. The defendant requested the court to instruct the jury that "A 'passenger station,' within the meaning of section 22, c. 163, of the General Laws relating to the expulsion of a passenger from the cars for non-payment of fare, is a place where passengers are commonly allowed to get on and off the cars, a place specified on the time tables and fare tariffs of the company as one of their stations, and a point to which tickets from other stations are commonly sold when called for," and excepted to its refusal to do so. It was not disputed that the intestate was run over by a freight train whilst lying intoxicated on the railroad track.

Facts.

Aldrich & Remick and Jeremiah Smith for plaintiff.
O. Ray & I. W. Drew for defendant.

DOE, C. J.—"No railroad corporation shall eject any person from its cars, for non-payment of fare, excepting at some passenger station." Gen. Laws, c. 163, § 22. "Passenger station" may have different meanings in different statutes or in different connections. In this clause, it does not mean less than a stopping place at which passenger tickets are ordinarily sold. If Waldron was ejected for non-payment of fare, his ejection was illegal.

**Non-payment
of fare—Place
of ejection.**

Kilpatrick, a brakeman on the train that run over Waldron, was not called as a witness by either party at the trial. On the cross-examination of Gonyea, the engineer of that train, the plaintiff's counsel, holding up a paper, asked, "Do you Kilpatrick's handwriting?" The witness replied that he did not. The plaintiff's counsel then said: "He gave his statement, and has since been discharged by the Grand Trunk Railway Company, hasn't he?" This was one way of informing the jury that the exhibited paper contained Kilpatrick's written statement, that it was adverse to the defendant, and that for this reason Kilpatrick had been discharged by it. The objection to this unsworn testimony was not avoided by the interrogative form of words. The substance was inadmissible. The effect of the testimony was intensified by the declaration that, if the defendant objected to the so-called question, the plaintiff would waive it. This method of in-

creasing the force of incompetent evidence is illustrated by the case supposed in *Bullard v. Boston & M. R. Co.*, 64 N. H. 27, 35; and nothing need be added to the decision of that case. A judicial trial means a fair trial. The court has no discretionary power to compel a party to submit to a trial that is not fair. "Had the plaintiff's whole case been proved in the same way (by the unsworn testimony of his counsel), the error, although extended in fact over more ground, would not have been raised to a higher degree of illegality." The wrong was not rectified, the error was not acknowledged, the testimony was not withdrawn, and the plaintiff did not obtain explicit instructions from the court to the jury to disregard it.

The statement of the plaintiff's counsel that a Texas jury had given a verdict for \$10,000 in a similar case, and that another jury

had given a verdict of eight or ten thousand dollars
Argument of against this defendant in another case, was incompetent;
counsel— and the error is not cured by the circumstance
Prejudicial that this testimony was given in an altercation begun
language. by the defendant's counsel. It is not improbable that
 the trial was so unfair on both sides that no verdict

for either party could be sustained. The verdict is set aside, not because the party gaining it introduced incompetent evidence before his adversary did the same thing, nor because he introduced more incompetent evidence than his adversary, but because a material part of his evidence was inadmissible and prejudicial, and the trial was unfair and illegal.

Verdict set aside.

Expulsion—Usual Stopping Place.—Where the plaintiff in an action to recover for wrongful ejection from a train, testified that he was expelled at the Azusa station and other witnesses adduced on his behalf, speak of Azusa as a small town where the train stopped, the requirement of the California statute (Civil code, Sec. 487) that the ejection must be at a usual stopping place or near a dwelling house is sufficiently met and no further proof on the point is required. *Wright v. California Cent. R. Co.* (Cal.) 20, Pac. Rep. 740.

Where Expulsion May Take Place.—See *Louisville C. & L. R. Co. v. Sullivan*, and note, 16 Am. & Eng. R. R. Cas. 390, 397.

MISSOURI PACIFIC R. CO.

v.

JOHNSON.

(*Texas Supreme Court, November 23, 1888.*)

Passenger—Injuries—Derailment—Defective Track—Bad Weather.—In an action to recover damages for injuries caused through the derailment of a train,

the court instructed the jury that a railroad company is not liable for the results of the accident if the evidence shows that the accident was directly caused by an unprecedented spell of bad weather, and that this bad weather could not have been guarded against by human skill and judgment, but that if the road was out of repair before the bad weather set in, and proper judgment was not used beforehand to put it in good condition, and the injury resulted from the bad condition of the road which could have been avoided by proper skill, the company can not avail itself in defence of the fact that the accident was caused by an unprecedented spell of bad weather. *Held*, that such an instruction was not liable to the objection that it made the railroad company liable for the consequences of unprecedented bad weather, whether it could have anticipated such bad weather or not, and whether the alleged prior negligence contributed to the accident or not.

Exemplary Damages—When Recoverable.—If the court instructs the jury that exemplary damages are recoverable where there is wilful misconduct, or such an entire want of care as would raise the presumption of conscious indifference to the consequences, but fails distinctly to tell the jury that the acts of gross negligence upon which the recovery of exemplary damages is predicated, must have contributed to the accident, the instruction is erroneous.

Personal Injuries—Compulsory Examination of Person.—When the court orders an examination of the plaintiff's person, it ought to appoint either experts of its own selection, or such as may be agreed upon by the parties; and it is not error to refuse to compel him to submit to examination by a physician named by the defendant, to whom he objects.

APPEAL from District Court, Upshur County.

Action to recover damages for personal injuries sustained by plaintiff.

J. R. Burnett for appellant.

N. W. Finley & H. Chilton for appellee.

GAINES, J.—In December, 1887, certain coaches of a passenger train operated by the appellant company were derailed near the town of Troupe, in Smith county. The appellee was a passenger upon the train at the time of the accident, and the car upon which he was being conveyed was overturned, and he was injured. He brought this suit to recover damages, both actual and exemplary, for the injury. During the trial the plaintiff, having introduced evidence tending to show gross neglect on part of the defendant in failing for a long time to keep in repair the road it was operating, was permitted to prove, over the objection of the defendant, that it was the general reputation in the community along the line of the road that the track was in bad order. It is to be presumed that the evidence was admitted for the purpose of showing that the company had knowledge of the defective condition of the road. The evidence may have been admissible for this purpose, though it seems to us it was unnecessary. The condition of the track, as is shown by all the evidence, had not materially changed for several months prior to the accident; and if that condition was such as plaintiff claimed it to be,—unsafe by reason of old and worn-out rails, ties rotten at the ends, so that they afforded no protection to the rails, etc,

Facts.

—the want of repair was visible and manifest, and the company must be held to have known of it. Not to know it would be greater negligence than to know it and not repair; and, as a matter of fact, it would be absurd to presume that for this long period of time the company's officers did not have actual knowledge of the defective condition of the track.

It not appearing that the agents of the company charged with the duty of keeping the roadbed in repair lived in, or were brought directly into communication with, the community in which the reputation was sought to be proved, it may be doubted whether, under all the circumstances, evidence of general reputation should have been admitted. But was the appellant prejudiced by the introduction of the evidence? It will appear further on in this opinion the verdict for exemplary damages cannot be permitted to stand, and hence it is unnecessary to discuss the effect of the evidence upon the verdict of the jury in that particular. Its effect upon the finding for actual damages will be disposed of in connection with the question of the correctness of the ruling of the court in the admission of the evidence of Col. T.

Evidence of general reputation. R. Bonner, which is raised in the second assignment. That witness was permitted to state, over objection of defendant, that he wrote a letter to the local treasurer of the company in St. Louis, informing him of the condition of the road. The testimony was objected to, on the grounds that the original letter should have been produced or its absence accounted for, and that notice to the local treasurer was not notice to the company. Admitting that the treasurer was the agent of the company in regard to this matter, notice should first have been given to defendant to produce the letter. If it should be held that the letter did not pass into defendant's custody, then it should have been shown that the plaintiff could not produce it. The evidence was clearly inadmissible. But as to its effect upon the verdict for exemplary damages the admission becomes immaterial.

But did the admission of this evidence, and that of the general reputation as to the condition of the road, operate to the prejudice of appellant upon the main issue? It was clearly the purpose of the testimony, not to prove the main fact, —the negligence of the defendant,—but to show knowledge. But it is held that, when evidence is introduced for a special purpose that is not competent upon the main issue, it is the duty of the court in the charge to confine its consideration to the particular issue upon which it is relevant. In such a case a charge of that character is proper. But the rule in this court is not to reverse for a mere failure to give an appropriate instruction, unless a special charge has been asked, sufficient

Admission of evidence not prejudicial. —the negligence of the defendant,—but to show knowledge. But it is held that, when evidence is introduced for a special purpose that is not competent upon the main issue, it is the duty of the court in the charge to confine its consideration to the particular issue upon which it is relevant. In such a case a charge of that character is proper. But the rule in this court is not to reverse for a mere failure to give an appropriate instruction, unless a special charge has been asked, sufficient

at least to call the attention of the court to the necessity of giving some instruction upon the point. It frequently occurs that evidence not admissible upon the main issue is admitted for a special purpose, and that the object of its admission is so obvious that the jury cannot be misled. It seems to us, therefore, that the reason of the rule which requires a special request for an instruction applies in such case with undiminished force. Moreover, we are of opinion that the jury could not have been misled in this particular case. The evidence was but cumulative, and tended but slightly to establish a fact upon which the other testimony was overwhelming on behalf of the plaintiff. A cloud of witnesses, some of whom had walked over the track, testified to facts which showed beyond controversy its defective condition. Even the testimony of defendant's witnesses tended to establish the same conclusion. The testimony of its roadmaster showed that the iron was 14 or 15 years old, and that some of the ties were rotten, and that the bed was in bad condition on account of rain and snow. He stated that track-walkers had to be kept upon the road to flag the trains in case of danger, and, from his testimony, it is to be referred that this was an extraordinary precaution taken on account of the condition of the road. His testimony that 92,002 ties, out of 116,160 necessary to tie the road, had been put down in 1884, and subsequent to that time, does not weigh against the testimony of the witnesses who swore that many of the ties were rotten at the end, so as not to support the rails, and that in some places two or more of such ties were to be found in succession. All defendant's witnesses virtually admitted that the condition of the road was bad, but claimed that it was due to bad weather. Under this state of case, it is unreasonable to suppose that the evidence had any effect upon the minds of the jury, so far as the main issue was concerned, and its admission, therefore, was harmless error.

It is also assigned that the court erred in refusing to compel the plaintiff to submit to a physical examination by physicians, in order to determine the extent of his injuries. The facts relating to this matter, as shown by the bill of exceptions, are that the court did make the order; that the defendant presented Dr. Hicks and Dr. Daniels to make the examination, and that the plaintiff declined to be examined by Dr. Hicks, assigning no other reason except his personal aversion to that gentleman. He expressed his willingness to be examined by any other respectable physician. Dr. Daniels declined to make the examination alone. These facts being reported to the court, it refused to compel the plaintiff to submit to the examination by Dr. Hicks. In this we think there was no error. There is authority for holding that, when the ends of justice demand it, such an examination may

Compelling plaintiff to submit his person to experts.

be compelled. *Schroeder v. Chicago etc. R. Co.*, 47 Iowa, 375; *Atchinson, T. & S. F. R. Co. v. Thul*, 29 Kan. 466; *Turnpike Co. v. Bailey*, 37 Ohio St. 104. The supreme court of Iowa find a precedent for the practice in that of the ecclesiastical courts of England in cases of divorce, where the question of impotency is involved. This question was before this court in the case of *International & G. N. R. Co. v. Underwood*, 64 Tex. 463. The court, without deciding positively that an examination can be compelled, say that it should not be ordered unless the application therefor showed that it was necessary to attain the ends of justice; and intimate that in no case would the judgment be reversed if the plaintiff had shown himself willing to be examined by competent persons. We only decide here that the court did not err in refusing to compel plaintiff to be examined by the one physician to whom he expressed an objection, although this objection did not go to the competency or integrity of the physician proposed. If this power should be exercised, at all, it should be by the appointment by the court of one or more disinterested experts, either of its own selection, or such as may be agreed upon by both parties.

The court, in the sixth paragraph of the charge, instructed the jury as follows: "The defendant company would not be liable in this case, and you will find for defendant, if the proof shows that the accident was directly caused by an unprecedented spell of bad weather, as sudden freezes and thaws, and that this spell of weather could not have been guarded against by human foresight, skill, and judgment. If, however, the road had been out of repair before the bad weather set in, and proper judgment was not used beforehand to put the roadbed in good condition, and the injury resulted from a bad condition of the road, and imperfect and bad track and road, and the same could have been avoided by proper skill and judgment, then the company cannot defeat a recovery by proof that the accident was caused by an unprecedented bad spell of weather." This charge is assigned as error, and in support of the assignment the proposition is submitted, that "they made appellant liable for the consequences of unprecedented bad weather, whether appellant could or should have anticipated such bad weather or not, and whether the alleged prior negligence caused or contributed to the accident or not; and the charges were too onerous and misleading." We do not assent to the proposition that a mere continued spell of wet weather, with a fall of snow, is such an unexpected and unforeseen contingency as will release a railroad company from liability to a passenger for injuries resulting to him from the failure to keep the track in repair.

In *International & G. N. R. Co. v. Halloren*, 53 Tex. 47, the

accident resulted from a washout, caused, as witnesses testified, by "the hardest rain at and about the locality of the accident which any of the witnesses had ever seen in that part of the country." The section boss had passed over the track but a short time before the accident, and found it in safe condition. The accident occurred at night. The court held that under this state of facts the court should have charged the jury that the company was not responsible unless those in charge of the train knew of the washout. In *Gulf C. & S. F. R. Co. v. Pomeroy*, 67 Tex. 498, it was held that the company could not defend itself against a claim for damages resulting from insufficient water ways, by showing that the flood which caused the injury had been of very infrequent occurrence; but that, in order to excuse itself, it must show that it was such extraordinary flood as had not occurred in that locality within the memory of persons there living. We think in this climate railroad companies must provide against the dangers resulting from continuous rains and melting snow. If the break in the rail caused the injury, and was a sudden fracture, brought about by cold weather, which the company did not have time to discover, and if defects in the track did not contribute to it, then the company was not liable, provided the rail before the accident was such as a person of competent skill might reasonably presume, upon inspection, to be free from liability to such fracture. The portion of the charge under consideration might well have been confined to this view. In so far as it was not so restricted, it was liberal to the defendant. In so far as it charges that the company was liable if the accident was caused by defects in the road caused by bad weather, if such defects could have been provided against, the charge was certainly correct. We think the charge not subject to the criticism made upon it.

We are, however, cited to the case of *Louisville City R. Co. v. Weams*, 80 Ky. 420, which holds that an instruction that a carrier "was bound, as far as human foresight and care would enable it," to carry a passenger in safety, was erroneous; from which it is to be inferred that it is claimed that the words "human foresight, skill and judgment," in the instruction in question, was "too onerous and misleading," though this is not distinctly submitted in appellant's proposition.

In *Hutchinson on Carriers* it is said: "In *Christie v. Griggs*, 2 Camp. 79, SIR JAMES MANSFIELD, C. J., stated the law upon this subject to be that, while a carrier did not warrant the safety of the passenger as the common carrier did that of the goods, he was nevertheless bound to provide for his safe conveyance, 'as far as human care and foresight will go,' and this or equivalent language has been employed almost universally in subsequent cases in which the obligation of the passenger has been defined." See

section 500, and numerous cases cited; also *Dougherty v. Missouri R. Co. (Mo.)*, 34 Am. & Eng. R. R. Cas. 488; and cases cited. See also *Louisville & N. R. Co. v. Ritter's Admr.*, 28 Am. & Eng. R. R. Cas. 167.

It is also complained that the verdict for actual damages is excessive. The plaintiff's sufferings were not great, his expenses and loss of time inconsiderable. But he received an injury near the small of his back, from which, as he testified, **Damages not excessive.** he had not recovered. He dragged his right leg in walking. He could not lie upon his side or back. He suffered continuously from headache, to which he had not been previously subject, and had lost 25 pounds in weight. Dr. Walker, who was sworn in his behalf, testified that his symptoms indicated that he had received a spinal injury which affected his nervous system; that he had examined the plaintiff, and found that in his leg there was loss both of motion and of sensation; that when such injuries were slight they resulted in a speedy recovery; and the fact that some six months had passed without material improvement indicated that his injuries were serious and permanent. He also testified that in such a case the disease was liable at any time to result in paralysis. His opinion was that plaintiff's injuries were permanent, and would probably so result. The physicians who were sworn for defendant testified that they attended the plaintiff a short time after the accident, and thought his injuries were slight, and that he would soon recover. They were not examined upon an hypothetical case, based upon the evidence, and their testimony is not necessarily in conflict with that of Dr. Walker. We must presume that the jury believed that the plaintiff testified the truth in regard to his symptoms, and that Dr. Walker's opinion, based upon the facts so testified to, as well as his own observation and examination of the plaintiff, was correct, and, if so, we cannot say the verdict is so excessive as to authorize us to set it aside.

The assignment that the charge upon exemplary damages is erroneous we think well taken. The charge is as follows: "Exemplary damages are recoverable where there is wilful misconduct, or such an entire want of care which **Exemplary damages—** would raise the presumption of conscious indifference **Instructions.** to the consequences, as where the injury was done wilfully, or was the result of that reckless indifference to the rights of others which is equivalent to an intentional violation of them; or if defendant company knew of the defects, and operated the road indifferent to the passengers thereof, they would be liable in exemplary damages; but if the injury resulted from causes such as are described in defendant's answer, which could not have been avoided by the exercise of skill and judgment, as before explained, it would not only defeat actual, but exemplary,

damages." The vice in the foregoing charge is that it fails distinctly to tell the jury that the acts of gross negligence, upon which the recovery of exemplary damages is predicated, must have contributed to the accident. The trial judge probably meant this, but the idea is not distinctly conveyed. The jury may well have considered themselves authorized by this instruction to give exemplary damages on account of the general bad condition of the road, although the ties, roadbed, and iron, except as to the fracture which caused the derailment, were in perfect condition at the place of the accident. This was an important issue upon the question of the recovery of exemplary damages, and should have been clearly presented. It is not a mere omission to charge, but it is a misleading instruction, and is therefore fatal to the verdict for exemplary damages. The appellee will be afforded the opportunity to remit the recovery for exemplary damages, and, if this be done, the judgment will be affirmed. Otherwise it will be reversed, and the cause remanded.

Condition of Track—Unprecedented Weather.—Where the evidence showed that there was much continuous rain and some snow for a considerable time before the accident, but that there was no such state of weather as might not be expected during the winter, or against the bad effects of which reasonable care would not give full protection, and the direct cause of the accident, the evidence tended to show, was a broken rail, an instruction to the effect that the railroad company would not be liable if the defect that caused the accident was brought about by weather, unusual and unprecedented, against which the company could not have guarded by the exercise of proper care and skill, is a substantially correct statement of the law applicable to the case. *Missouri Pacific R. Co. v. Mitchell* (Tex.), 10 S. W. Rep 411.

Same—Negligence in Maintaining.—It is the duty of a railroad company to have a good, substantial, and safe road track for the use of its trains, and default in that duty, in consequence of which a passenger is injured, is negligence for which the company will be responsible in damages. In a case in which it is shown that after an accident on the road causing injury, it was found that a rail only 10 feet long was out of place, and the track was very bad, the rails much worn, and were of all lengths, while usually they are 30 feet long, the verdict of the jury finding negligence should not be disturbed. *Florida R. & Nav. Co. v. Webster* (Fla.), 5 S. Rep. 714.

Derailment of Train—Negligence—Province of Jury.—The evidence showed that the train upon which the deceased was travelling was made up as follows: First, the tender and locomotive, reversed, tender being in lead of locomotive; a flat car next to engine; then a box car; and then several other flat cars. It also showed that the deceased and the three others who were likewise killed in the accident, took their places on an improvised seat on the flat car next to the engine. The seat was made by those on the car putting the ends of a plank upon two empty spike kegs. The plank was put up to them by the conductor, who requested them, however, to go into the box car, telling them it would be a better place for them to ride. They said they wanted to ride on the flat car to see the country. They made the same reply to the brakeman, who told them that the box car was a better and more comfortable place to ride. The conductor said nothing more, got into the box car, and the train started, and was running at a rate of speed variously estimated at from 15 to 20 miles an hour, when, on a down grade, the train jumped the track. The jarring of the flat car on which the deceased and his companions were, caused by the jerking of the engine after its derailment, hurled them from the car underneath the trucks of the engine, and

in the wreck the deceased and another were killed, and two others so injured that they afterwards died. There were no guards or side boards around the flat car, nothing by which those on it could catch hold, and no one was injured on the train except those on the flat car. The evidence further tended to show the grades, curves, newness, and unsettled condition of the roadbed at the place where the wreck occurred, and the liability of a train, with engine and tender reversed, and moving as this was, to be derailed when moving at a high rate of speed, and tended to prove that the servants of the defendant were guilty of negligence in running this train, made up as it was, over this road, in the condition it then was, at the rate of speed it was being run at the time the wreck occurred. It was held that the evidence was sufficient to justify the court in submitting to the jury, the question of the defendant's negligence and the plaintiff's contributory negligence. It appeared that the train was run regularly on week days as a mixed freight and passenger train, but on the Sunday on which the accident occurred it was running as a special train in the charge of the usual conductor. The deceased neither paid nor was asked to pay fare, and could not have insisted upon a right to travel upon the train. *Held*, that if the railroad company received the deceased upon its special train as a passenger for the purpose of being transported from one place to another, it assumed towards him the same duties as if he had been a passenger travelling on the same train on its regular trips, the passenger assuming no risk on this trip other than on a regular one, except such as was necessarily incident to the character of the train and the purposes for which it was being run. *Wagner v. Missouri Pacific R. Co. (Mo.)* 10 S. W. Rep. 486. In this case it was also held that, although the petition had failed to allege that the deceased was a passenger at the time when he received the injury which resulted in his death, the objection was waived by the defendant putting that question directly in issue by alleging that he was not a passenger.

Same—Weight of Evidence.—In Texas it is the province of the jury to find from the evidence what caused the accident and whether the defendant was negligent, and an instruction in the following terms has been held to be an instruction upon the weight of the evidence; "where a railroad car, containing passengers, is thrown from the track, and a passenger, who has paid his fare, is thereby injured, the presumption is that the accident resulted either from the fact that the track was out of order, or that the train was badly managed, or both combined, and the burden is on the defendant company to show by a preponderance of evidence that it was not negligent in any of these respects." *San Antonio & Arkansas Pass. R. Co. v. Robinson (Tex.)*, 11 S. W. Rep. 327.

Pleading—Instruction.—The defendant in an action to recover damages for personal injuries, having asked for a continuation for the purpose of obtaining evidence to rebut the plaintiff's allegations as to the nature of his business and his standing in his profession; the plaintiff answered by striking out all allegations having any reference to the pecuniary loss or injury except as resulting from his impaired physical condition, and the mental and bodily pain produced thereby. *Held*, that instructions from which the jury might infer that they might award to the plaintiff damages for loss of business were erroneous, and that the error was not cured by subsequent instructions that there was no evidence before the jury showing any actual pecuniary loss from his business, and that the jury must exclude from their consideration, all elements of actual damages except what would be a fair compensation for the physical and mental suffering which the evidence showed to be the direct and proximate result of the injury. *San Antonio & Arkansas Pass. R. Co. v. Robinson (Tex.)*, 11 S. W. Rep. 327.

Evidence—Res Gestæ.—Where the plaintiff in an action claims to recover damages for injuries sustained through the derailment of the train in which he was travelling, testimony that the engineer was remonstrated with before the accident for having previously run the train recklessly over an unsafe and hastily constructed road, is not admissible as part of the *res gestæ*. *San Antonio & Arkansas Pass. R. Co. v. Robinson (Tex.)*, 11 S. W. Rep. 327.

LOUISVILLE, NEW ALBANY AND CHICAGO R. CO.

v.

SNIDER.

(Indiana Supreme Court, February 21, 1889.)

Personal Injuries—Expert Testimony—Opinion.—An expert witness, in an action to recover damages for personal injuries, may give an opinion as to the nature and extent of the injury sustained by the plaintiff, based in part on statements made to him by plaintiff.

Same—Existing Disease—Recovery.—Although the plaintiff, at the time of the injury, was afflicted with Bright's disease which had a tendency to aggravate the injury, he is entitled to recover compensatory damages.

Passenger—Injuries—Falling off Bridge—Contributory Negligence.—A passenger in a train injured through the falling of a bridge, cannot be guilty of contributory negligence when at the time of the injury he was in his proper place in the car and did not expose himself to the danger.

Same—Presumption of Negligence—Burden of Proof.—The burden of overcoming the presumption of negligence arising from evidence of an occurrence of an accident,—e g., the falling of a train through a bridge,—and injury to a passenger therefrom, is upon the carrier.

Same—Degree of Care—Instruction.—The omission of a carrier of passengers to exercise the highest degree of practicable care constitutes negligence, and in an action by a passenger to recover damages for personal injuries, an instruction that "negligence" means "either the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such person would not have done under the existing circumstances," is properly refused.

Carrier of Passengers—Inspection of Bridges—Duty—Negligence.—The duty of a railroad company engaged in carrying passengers is not discharged by the purchase from reputable manufacturers of the material used in the construction of its bridges, it being incumbent on the company to carefully and skilfully test and inspect the materials used before relying on their sufficiency and to continue the inspection from time to time whilst the bridges are in use.

APPEAL from Circuit Court, Clinton County.

Action by James B. Snider against the Louisville, New Albany & Chicago R. Co. to recover damages for personal injuries sustained by plaintiff whilst a passenger on one of defendant's trains. The defendant appeals from a judgment for the plaintiff.

Geo. W. Friedley, S. O. Bayless, and W. H. Russell for appellant.

Palmer & Palmer and Higinbotham & Bristow for appellee.

ELLIOTT, C. J.—The appellee was a passenger on one of the appellant's trains, which, by the falling of a bridge, was precipitated into White river, and the appellee was severely injured.

Dr. Bowles, an expert witness called by the appellant, gave an opinion as to the nature and extent of the injury sustained by the appellee, and on cross examination it was developed that his

testimony was in part based on statements made to him by the appellee. Waiving all questions of practice, and deciding the

**Expert
testimony
as to per-
sonal in-
juries.**

appellant's motion to strike out as if it were properly restricted to the alleged incompetent part of the testimony, we have no hesitation in deciding that the trial court did right in overruling the motion. As we have often decided, the physical organs of a human being cannot be inspected by the eyes of a surgeon, and the statements of the sufferer must, of necessity, be taken by the surgeon. It is not possible for any surgeon, by a mere external examination, to always discover the character of an injury, and properly describe or treat an injured man; and for this reason, if for no other, the statements of the injured person descriptive of present pains or symptoms are always competent, although narratives of past occurrences are inadmissible. On this point our own decisions are harmonious, and they are right upon principle, and are well supported by authority. *Cleveland, C. C. & I. R. Co. v. Newell*, 104 Ind. 264, 23 Am. & Eng. R. R. Cas. 492; *Louisville, N. A. & C. R. Co. v. Falvey*, 104 Ind. 409, 23 Am. & Eng. R. R. Cas. 522; *Louisville, N. A. & C. R. Co. v. Wood*, 113 Ind. 544; *Board v. Legget*, 116 Ind. —; *Hatch v. Fuller*, 131 Mass. 574; *Atchinson T. & S. F. R. Co. v. Johns*, 36 Kan. 769; *Quaife v. Chicago & N. W. R. Co.*, 48 Wis. 513. From these decisions we shall not depart.

The fact that the appellee was suffering from Bright's disease at the time he was injured does not impair his right of recovery.

**Disease
at time
of injury.** The rule is this: "Where a disease caused by the injury supervenes, as well as where the disease exists at the time of the injury, and is aggravated by it, the plaintiff is entitled to full compensatory damages."

Ohio & M. R. Co. v. Hecht, 17 N. E. Rep. 297; *Louisville, N. A. & C. R. Co. v. Wood*, *supra*; *Indianapolis, P. & C. R. Co. v. Pitzer*, 109 Ind. 179, 25 Am. & Eng. R. R. Cas. 318; *Terre Haute & I. R. Co. v. Buck*, 96 Ind. 346; *Ehrgott v. Mayor*, 96 N. Y. 264; *Jucker v. Chicago & N. W. R. Co.* 52 Wis. 150, 18 Am. & Eng. R. R. Cas. 234; *Denver & R. G. R. Co. v. Harris*, 122 U. S. 597; *Lake Shore & M. S. R. Co. v. Rosenzweig*, 113 Pa. St. 519, 26 Am. & Eng. R. R. Cas. 489; *Houston & T. C. R. Co. v. Leslie*, 57 Tex. 83. The rule we have stated is thus expressed in one of our best text-books: "Though the plaintiff be afflicted with a disease or weakness which has a tendency to aggravate the injury, the defendant's negligence will still be held to be the proximate cause." 2 *Shear. & R. Neg.* (4th ed.) § 742.

The instructions clearly and properly state the law on this subject.

The court did not err in instructing the jury as to the degree of care required of the appellant; at least, not as against

the appellant. The rule is well settled that carriers are bound to use the highest practicable degree of care to secure the safety of passengers. There was no evidence of contributory negligence on the part of the appellee, and the court might well have refused any instruction at all upon that point. Where a passenger is in his proper place in the car, and makes no exposure of his person to danger, there can be no question of contributory negligence. Decisions like that of *Indiana, B. & W. R. Co. v. Greene*, 106 Ind. 279, 25 Am. & Eng. R. R. Cas. 322, in cases of persons injured at a railroad crossing, are not applicable to such a case as the one at our bar. The law is, as the jury were told, that carriers of passengers are liable for the slightest negligence. Any negligence on their part is actionable. *Bedford, S. O. & B. R. Co. v. Rainbolt*, 99 Ind. 551, 21 Am. & Eng. R. R. Cas. 466.

Degree
of care—
Contributory
negligence.

The law will not tolerate any negligence on the part of carriers, although they are not insurers of the safety of their passengers. The burden of overcoming the presumption of negligence arising from evidence of the occurrence of an accident and injury to a passenger is upon the carrier. *Packet Co. v. McCool*, 83 Ind. 392; *Terre Haute & I. R. Co. v. Buck*, 96 Ind. 346; *Cleveland, C. & I. R. Co. v. Newell*, *supra*; *Bedford, S. O. & B. R. Co. v. Rainbolt*, *supra*; *Anderson v. Scholey*, 114 Ind. 553. In *Louisville, N. A. & C. R. Co. v. Pedigo*, 108 Ind. 481, the rule was applied, in a case growing out of the same occurrence as that in which the appellee was injured. The twenty-second instruction asked by the appellant, and refused, reads thus; "The court further instructs you that by 'negligence,' when used in these instructions, is meant either the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such person would not have done under the existing circumstances." This instruction was properly refused. It is not proper in such a case as this to define negligence as it is defined in this instruction. In a case of this character, the omission to exercise the highest degree of practicable care constitutes negligence, but in other cases the failure to exercise ordinary care constitutes negligence. Counsel are greatly in error in asserting, as they do, that the instruction correctly furnishes the standard for the government of the jury. The appellant was, as we have substantially said, bound to do more than prudent men would ordinarily do, since it was bound to use a very high degree of care.

Presumption
of negligence
—Burden of
overcoming.

The duty of a railroad company engaged in carrying passengers is not always discharged by purchasing from reputable manufacturers the iron rods or other iron work used in the construc-

tion of its bridges. The duty of the company is not discharged by trusting, without inspecting and testing, to the reputation of the manufacturers, and the external appearance of such materials. The law requires that before the lives of passengers are trusted to the safety of its bridges, the company shall carefully and skilfully test and inspect the materials it uses in its bridges. This duty of inspection does not end when the materials are put in

place, but continues during their use; for the company is bound to test them, from time to time, to ascertain whether they are being impaired by use or exposure to the elements. *Manser v. Eastern Counties R. Co.* 3 Law T. (N. S.) 585; *Texas & St. L. R. Co. v. Suggs*, 62 Tex. 323, 21 Am. & Eng. R. R. Cas. 475; *Stokes v. Eastern Counties R. Co.* 2 Fost. & F. 691; *Robinson v. New York C. & H. R. Co.* 9 Fed. Rep. 877; *Richardson v. Great Eastern R. Co.* L. R. 10 C. P. 486; *Ingalls v. Bills*, 9 Metc. 1; *Frink v. Potter*, 17 Ill. 406; *Bremner v. Williams*, 1 Car. & P. 414; *Hegeman v. Western Railroad Corp.*, 13 N. Y. 9; *Alden v. New York Cent. R. Co.* 26 N. Y. 102.

The decision in the case of *Grand Rapids & I. R. Co. v. Boyd*, 65 Ind. 527, is not in conflict with this doctrine, for in that case an inspection was made.

Judgment affirmed.

Injury to Diseased Person—Liability of Carrier.—See *Louisville & N. R. Co. v. Jones*, 35 Am. & Eng. R. R. Cas. 417, and authorities cited in note p. 422.

KNOFF

v.

RICHMOND, FREDERICKSBURG AND POTOMAC R. CO.

(*Virginia Supreme Court of Appeals, February 21, 1889.*)

Passenger—Contract—Construction.—An agreement made by a railroad company to furnish to a firm "a ticket entitling either one" of the partners of the firm "but only one on any train, to occupy one seat and travel on the passenger trains" of the railroad company, confers a right of passage upon only one member of the firm at a time, and the evidence of that right is a ticket which must be presented to the conductor of any train upon which a partner of the firm should take passage.

Same—Province of Jury—Renewal of Ticket.—Under such contract, it is a question for the jury to decide whether, upon the practical construction of the contract adopted by the parties themselves, it was the duty of the firm to have applied to the company for the renewal of an annual pass issued by the company, or whether it was the duty of the company to furnish such renewal without any application therefor.

ERROR to Circuit Court, Caroline County.

Action to recover damages for the wrongful ejectment of the plaintiff, M. M. Knopf, from a train belonging to the defendant, the Richmond, Fredericksburg & Potomac R. Co. The plaintiff brings error to review a judgment for the defendant.

J. G. Mason and E. C. Moncure for plaintiff in error.

A. B. Chandler for defendant in error.

LEWIS, P.—This was an action of trespass on the case in the circuit court of Caroline county against the Richmond, Fredericksburg & Potomac Railroad Company, to recover damages for the alleged wrongful ejectment of the plaintiff, M. M. Knopf, from one of the passenger trains of the defendant company on the 27th of January, 1887. The plaintiff claimed the right to be transported by the said company in the train from which he was ejected by virtue of a certain written contract, dated the 4th day of April, 1885, and of which the following is a copy :

Facts.

"This agreement, made and entered into the 4th day of April, 1885, between the Richmond, Fredericksburg and Potomac Railroad Company, of the first part, and the firm known and designated as 'Knopf Brothers & Co.,' of Caroline county, Va., whereof Jacob Knopf, C. E. Knopf, A. G. Knopf, and M. M. Knopf are the individual members, of the second part, witnesseth, that for and in consideration of the sum of one dollar, paid to the second party by the first party (the receipt whereof is hereby acknowledged), and for the further consideration of a ticket, entitling either one of the said Knopfs, but only one, on any train, to occupy one seat, and travel on the passenger trains of said railroad company between Richmond and Quantico, without charge, that said first party may enter upon and take away from a tract of land lying west of said line of railroad, between it and the Mattaponi river, and opposite or nearly so, to the turnout known and designated as 'Baylor's,' and extending from near the north, and to near the south end of same, or a few hundred yards beyond these limits, in either direction, the gravel required for the purposes of the said first party (but not for sale by the said first party to another): provided, that the area of said land taken from said tract in any one year, beginning with the date of this agreement shall not exceed one-half an acre. It is understood that this arrangement shall continue in any event for one year from said date, and thereafter either until said railroad company shall be double-tracked or voluntarily relinquish the use of and retire from the tract aforesaid, and remove therefrom its tracks and cars, or until the said firm or its members shall sell out, convey, or otherwise relinquish, the fee simple in said tract of land to other parties or persons than any named in this deed, and no longer. And it is covenanted and

affirmed by the said second party that they are the lawful and sole owners of the said tract of land; that they have the right to convey it or any part of it; that they have not given any lien or placed any incumbrance upon the same; and that the first party shall have peaceful possession of the premises for the purposes aforesaid, according to the terms of this agreement, which shall be held to cover all claims for damages or compensation incident to, connected with, or otherwise arising from, the removal of said gravel by the party of the first part in executing the work contemplated by this agreement.

"Witness the following signatures and seals on the day and year first above written.

KNOPF BROS. & Co. [Seal]

"THE RICHMOND, FREDERICKSBURG

"AND POTOMAC RAILROAD Co.,

[Seal of the Company] "By E. T. D. MYERS, Gen'l Supt."

The plaintiff was a member of the firm of Knopf Bros. & Co., and the question is as to the true construction of the said contract. The facts are not certified, nor is the evidence, and the case turns upon the action of the circuit court at the trial in refusing to give to the jury certain instructions asked for by the plaintiff, and in giving certain instructions offered by the defendant.

It is clear, we think, that, according to the true interpretation of the contract, not more than one member of the firm could ride at the same time on the same train, and that not more

Interpretation of contract— The expressed consideration of the contract is "a ticket, One partner entitling either one of the said Knopfs, but only one, to ride at a on any train, to occupy one seat, and travel on the passenger trains" of the defendant company; which shows time. with reasonable certainty that not only was the right

to be carried restricted to one member of the firm at a time, but that the evidence of that right was to be a ticket, to be presented to the conductor of every train upon which any one of the firm should take passage during the continuance of the contract aforesaid. The firm was entitled to "a ticket," and not more than one.

It is admitted that immediately after the execution of the contract a ticket—*i. e.*, an annual pass—over the road of the defendant company was issued from the general office of the company to the firm, which ticket by its terms was to expire, and did expire, on the 31st day of December of the same year, and that upon its expiration a renewal of the ticket was applied for by the firm. It is also admitted that after the expiration of the renewed ticket no application was made to the company by the firm for a ticket of any kind, and that when the plaintiff was ejected from the train of the defendant, as aforesaid, he was on his way to the city of Richmond from Milford station, on the defendant's road, and that

he offered no ticket to the conductor, or evidence of any kind of his right to ride, and in point of fact had none; nor is it claimed that he was expelled from the train by the use of any more force than was reasonable and necessary.

The question was discussed at the bar whether or not it was the duty of the firm to have applied to the company for a renewal of the ticket or pass upon the expiration of the one issued for the year 1886,—the year preceding the date of the alleged injuries,—or whether it was the duty of the company to have furnished it without such application,—the contract continuing in full force. The latter view was contended for by counsel for the plaintiff, who insisted that the contract upon this point was, to say the least, ambiguous, and that it should in this particular be construed most strongly against the defendant. We think it was a question which could be properly determined in accordance with the practical construction put upon the contract by the parties themselves, and that the instructions of the court fairly left it to the jury to say what, upon the evidence, that construction was. In a recent case in the supreme court of the United States it was held that the practical construction which the parties had put upon the terms of their own contract was not only to be regarded, but that it must prevail over the literal meaning of the contract, and the rule is certainly a very just one. *District of Columbia v. Gallaher*, 124 U. S. 505. See also *Topliff v. Topliff*, 122 U. S. 121; *Kidwell v. Baltimore & O. R. Co.*, 11 Grat. (Va.) 676.

Renewal of
pass—Duty
of company
and of firm.

We have carefully examined the numerous instructions which were given to the jury, and also those which were refused, and, without commenting upon them *seriatim*, it is sufficient to say we are of opinion that there is nothing in the action of the circuit court, as disclosed by the record, of which the plaintiff can justly complain. In other words, the case was substantially submitted to the jury in accordance with the views expressed in this opinion. The jury found for the defendant, and the judgment upon the verdict is accordingly affirmed. *Carpenter v. Washington & G. R. Co.*, 121 U. S. 474; 31 Am. & Eng. R. R. Cas. 120.

Judgment affirmed.

MISSOURI PACIFIC R. Co.

v.

EVANS.

(Texas Supreme Court, October 12, 1888.)

Passenger—Voluntary Intoxication—Duty of Company.—If one, who has rendered himself incapable of self-protection by reason of a voluntary use of intoxicants, enters a train without right, and without the knowledge of the conductor, the railroad company does not owe him any duty beyond ordinary care to protect him from injury while upon the train, and to leave him in reasonably safe condition, voluntary intoxication being no excuse for a failure on the part of the traveller to exercise the duty of self-protection.

APPEAL from District Court, Anderson County.

Action to recover damages for negligently killing plaintiff's son. The defendant appeals from a judgment for the plaintiff.

John Young Gooch for appellant.

Gammage & Gammage and *W. A. Gregg* for appellee.

WALKER, J.—This appeal involves the degree of care or the duty owing by the railway company to the deceased, Ed. Evans, the son of plaintiff, and for whose death the suit was brought, under the circumstances of his death. February 9, 1886, at Oakwoods, a village on the railway of appellant, a few miles west of Trinity river, Ed. Evans, aged 26 years, and drunk, his condition having been noticed by his friends in the village, entered upon a freight train run by the defendant. The rules of the company forbade the carriage of passengers on such trains. The conductor did not know that Evans was upon the train, and the head brakeman, the only one of the employees shown to have been aware of his presence, thought he belonged, as clerk or in some way, to a gang of wood choppers in employ of the company, who had been taken upon the train. The train left Oakwoods about dark, and Evans was upon the front flat car; became reckless, so as to require the attention of the head brakeman for his safety. While on the car, Evans offered to pay his way to Palestine, where he said he had to go, naming some prominent citizens of that place as his friends. He finally became quiet, and fell asleep. After crossing the Trinity, the train stopped to water at Long Lake tank, near the east end of the bridge over the river. From the tank westward 50 yards was the bridge watchman's house; southwest, and about same distance, a negro's house; and southward, 300 yards, Mrs. Butler's

house. There was no hotel at Long Lake station; but one witness testified that he had stayed all night at Mrs. Butler's. There was no depot nor ticket office there; but it is a station, and passengers usually got on and off there. The station was in a field, and the railway track was frequently travelled by persons going east and towards Tucker, a village three and a half miles distant. On stopping at the tank, Evans climbed upon the tender, and was ordered down by the engineer. With aid from Gillis, the head brakeman, he got down. He then walked 150 or 160 feet to near the end of the train. When the train started, Evans was at a box car, apparently trying to enter. Gillis, seeing his danger, caught him by the arm and led him about 15 feet from the track between the tank and the watchman's house, and he sank down, and was there left alone. Gillis testified that he did not think Evans able to take care of himself while on the train, nor when left. About 15 minutes after the train left it was followed by another. A witness, who was engineer of the second train, testified that he passed Evans about 250 yards east of the tank, where he had been left by the first train. Evans then was walking on the ends of the cross ties, outside of the rails. As the train approached him, he staggered out to the right, and walked along until the train passed. This witness, on looking back, saw Evans walk back upon the track. About 15 minutes later a third train passed, also halting at the tank. The conductor testified to first seeing Evans lying upon the track at the cattle guard, 500 yards east of the tank, and at the exit from Mrs. Butler's field. The witness first saw Evans about 75 feet ahead. He was dressed in black, and, with his face from witness, lying upon the track where he had fallen. Witness reversed the engine, and whistled for brakes, but it was too late. Several cars passed over Evans, causing his death. His leg was broken and skull fractured. Witness left a man with Evans, and went on to Palestine, and reported the matter. The village of Tucker is three and one half miles east of the tank, and a wagon road extends to it from near the cattle-guard where Evans was killed.

The petition alleged negligence on part of the defendant—First, and chiefly, in the want of care under the circumstances, looking to the incapacity of Evans to take care of himself; and secondly, that there was want of care in running the train upon him. The charge of the court limited the jury to the first count for want of care in leaving him at the tank, in his condition, and without protection. Upon this the court instructed the jury: "If, however, the evidence satisfies you that at the time he [deceased] got on the train he was mentally incapable, from the use of intoxicants, of caring for and protecting himself, and of forming any judgment as to what he was doing, and if defendant's employes in charge of the train knew

**Allegations
in petition—
Instructions.**

that such was his condition, or knew from his conduct such facts as reasonably would have produced such knowledge in an ordinary mind, then it was their duty to prevent him from getting upon the train, and if they allowed him, with such knowledge, to get upon the train, and took him away from Oakwoods, it became their duty to exercise reasonable care to see to his safety, while they would still have the right, at the proper time and place, to put him off. In doing so, if he was in the condition above defined, they would have to exercise such care as is just defined to land him at a reasonably safe place, taking into consideration his condition, and all other circumstances affecting the question. . . . If Evans was in the condition defined, and got off the train, still, if you find that the degree of care defined would have required that he be not left at that point, then it was their duty to take him back upon the train, or do what the rule, as above given, would have required for his safety; and their failure to do so would be the same as if they had put him off." The defendant asked the following charge: "You are further instructed that the plaintiff, L. A. Evans, is not entitled to recover if her son was not in fact put off the train wrongfully, but was put off at a place where he could, by ordinary care, have avoided the injury. And if the deceased would not have been injured but for his intoxication, the plaintiff cannot recover." The court refused to give it as requested, but gave it with the following qualification: "Given with the qualification that it is to be considered in connection with the general charge, and with the further explanation that if Evans, when he got on the train at Oakwoods, was rendered incapable by drink or otherwise to the extent defined in the general charge, and if defendant's employes, knowing this, carried him away on the train, and put him off, or left him at the tank, still in that condition, then the rule stated in the above special charge does not apply, unless Evans, before he was killed, recovered so far as to be able to use care or discretion." The defendant asked the following charge, and it was refused: "If Ed. Evans saw, or could have seen, one or more houses near by the place where he was left, near by the tank, it was his duty to have tried to get accommodation there, if this would have been the course of a man of ordinary prudence. It is the duty of one put off of a train, even wrongfully, to take reasonable care of himself, and he cannot recover damages for an injury which would not have occurred if he had done so."

It is evident from these paragraphs from the record that the court impressed upon the jury that the defendant was charged with the duty of additional care towards the deceased by reason of his condition, by reason of his intoxication, for that was the only disturbing cause present and interfering with the ordinary course of action by the deceased, and that, by reason of such in-

toxication, the use of ordinary care of himself was excused or dispensed with. The court is referred to several cases involving the proper care required of railroad employes in putting persons from the trains when improperly aboard them. They will be examined. In *Houston & Texas C. R. Co. v. Devainy*, 63 Tex. 172, judgment was affirmed for damages received by plaintiff upon being put off the cars 200 or 300 yards from a station, in the dark, where, after taking a few steps he fell through a trestle, and was injured, the court having charged the right of the conductor to put a passenger off the train for want of a ticket; that it could lawfully be done, "but it must be in a place of safety." In *International & G. N. R. Co. v. Gilbert*, 64, Tex. 540, 22 Am. & Eng. R. R. Cas. 405, it was held to be want of proper care for the conductor to expel from the train, for non-payment of fare, a woman, "accompanied by her sister, and two infant children, in a swamp of a river, in a strange land, on a cold, dark night, where she could get no shelter except with negroes;" and that, under such circumstances, plaintiff walked several miles back to a place of safety, was a natural and proper act on her part. In *Texas & P. R. Co. v. Cole*, 66 Tex. 562, 27 Am. & Eng. R. R. Cas. 144, it was held that where an ejected passenger, at a place where, upon enquiry, she would probably have found comfortable lodgings, should have made the effort to get such protection, and that the railway company was not liable for injury caused by her walking a long distance to her destination at night. In each of these cases the passenger was without fault. Each had a ticket, and was on the train by mistake of the railroad officials. The locality, its surroundings, the night time, and the condition of the weather were considered in order to determine whether the railroad officials were in fault in ejecting from the trains; the enquiry being as to the safety of the passenger at the time and place. In the *Gilbert* and *Devainy* cases it was held that proper care indicated that the passenger should have been carried back, or to a safer place. In this case the deceased was in the neighborhood where he had passed his life. Houses were near, and there is no evidence of inclemency of the weather. While there was no station house or ticket office, yet passengers got on and off the trains at the place. It was early in the night, and, as in the *Cole* case, no reasonable doubt exists or is shown by the testimony but that deceased could have had shelter for the night had he sought it. Unless there was that in his condition imposing an extraordinary care as a duty upon the railroad officials, they had used proper care when they left deceased as they did, in a place safe in its surroundings. The deceased was wrongfully on the train, against the rules of the railroad company, and without the knowledge or consent of the conductor. The brakeman, Gillis, thought him one of the gang of wood choppers

Effect of instructions—
Duty to intoxicated passenger—
Authorities.

(employed upon the train), and did not know otherwise until after leaving Oakwoods. He was left where, with ordinary care on his part, he was in no danger. Our courts have held that "drunkenness, to afford a ground for avoiding a contract, must be so excessive as to render the person incapable of consent, or for the time to incapacitate him from exercising his judgment." *Reynolds v. Dechaums*, 24 Tex. 175. Voluntary intoxication is no excuse or justification for the commission of an act against the criminal laws committed in that condition. In *Houston & T. C. R. Co. v. Sympkins*, 54 Tex. 615, it was held that if the plaintiff, when run over and injured, was in a state of intoxication, "such conduct was contributory negligence." A like rule was intimated in *Houston & T. C. R. Co. v. Smith*, 52 Tex. 178, 22 Am. & Eng. R. R. Cas. 421. In 1 Thomp. Neg. 450, the rule is stated "that if a trespasser, by his own act, deprive himself of the exercise of his faculties, for example, by falling asleep, or being drunk, upon the track, such conduct is contributory negligence which constitutes a bar to his action for damages;" citing authorities to which we do not have access. In Whart. Neg. § 306: "An insane person is therefore distinguishable from a drunkard by the fact that with the former incapacity is involuntary, while in the latter it is voluntary; and hence a drunkard may be guilty of contributory negligence by getting drunk before putting himself in a position of danger in which he receives injuries, from which, had he been sober, he would have escaped." Again, citing from Beach, Cont. Neg. 391. "When contributory negligence is the issue, it must appear that the plaintiff did not exercise ordinary care, and that, too, without reference to his inebriety, or he may have his action. The question is whether or not the plaintiff's conduct came up to the standard of ordinary care, not whether or not the plaintiff was drunk. As sober men are frequently careless and guilty of negligence, so it very occasionally happens that drunken men are careful and prudent, or, if negligent, that their intoxication cut no figure in the matter; from which the law infers that there is no proper and necessary connection between sobriety and carefulness, nor between inebriety and negligence."

Following the weight of authority it would seem the railway company would only be liable for wanton or wilful neglect on the part of its employees towards the deceased of the duty of caring for his safety, if he was intoxicated, even to the extent of insensibility. It cannot be conceded to one incapable of protecting himself from the voluntary use of intoxicants that, by entering upon a train from which he is forbidden, and without the knowledge or consent of the conductor, he can thereby impose upon the railway company any duty beyond ordinary care to protect him from injury while upon the train, and to leave him in a reason-

**Liability of
railway for
injury to in-
toxicated
person.**

ably safe condition. The appellant insists, and not without reason, that, instead of excusing want of proper care, the intoxication was a continuing fact, evidencing negligence, if not negligence itself, without which the injury would not have happened. If, as it seems to be, voluntary intoxication to the extent of insensibility is chargeable as negligence when contributing to the injury, it would follow that a less degree of or partial intoxication would not excuse or dispense with the duty of self-protection by proper care to avoid danger. The term "partial intoxication" is used as descriptive of the condition of the deceased, as his mental condition is indicated by his actions, as appears from the testimony. His entry upon the train at Oakwoods; his proposal to pay his way when he was discovered not to belong to the wood chopper's gang; his referring to his friends at Palestine; his descent from the tender when ordered; his effort to board the train when starting at Long Lake tank; his movement from the tank in the direction he had spoken of going; his careful avoiding danger when meeting the second train; and his continuing 500 yards from the tank towards Palestine,—were voluntary and rational acts, by no means denoting more than a condition of partial drunkenness. The refusal to give the charge first asked without qualification was error. The second charge refused was defective, and its refusal was not improper, yet the latter part might or should have been given to the jury. There can be no doubt but that the verdict was induced by the charge given. The question of care or want of it on part of the employees controlling the train that ran upon the deceased, causing his death, was not passed upon by the jury. For the reason that the degree of care given in the charge as the duty of the defendant company towards the deceased was higher and more onerous than the law requires in like circumstances, and for the further reason that mental incapacity, occasioned by intoxication, was held to excuse the deceased from any care whatever for his safety, the judgment below must be reversed. The issues of fact for the jury upon a new trial will be negligence or not upon the part of the railway company, or want of it on part of deceased, the duties of each to be defined as above; that is, without reference to whether deceased was drunk or sober.

Reversed and remanded.

PALMER

v.

PENNSYLVANIA R. Co.

(New York Court of Appeals, November 27, 1888.)

Passenger—Snow and Ice on Platform—Duty of Company.—A railroad company is under no obligation to remove the effects of a continuous storm of snow, sleet and rain from the exposed platform of the car while making its passage between stations or the *termini* of its route; and a passenger who has reason to know that there is snow and ice upon the platform, and that the company has had no reasonable opportunity to effectually remove it, cannot recover damages for injuries sustained through a fall caused by slipping thereon.

APPEAL from General Term of the Supreme Court, Second Department.

Action to recover damages for injuries sustained by a passenger whilst alighting from a train belonging to the defendant. The defendant appeals from a judgment in favor of the plaintiff.

R. F. Wilkinson (*Homer A. Nelson*, of counsel) for appellant.

Grant B. Taylor for respondent.

RUGER, C. J.—The evidence was quite conflicting as to the presence of any ice on the platform of the car from which the plaintiff fell and broke his leg, and as to the quantity of snow lying thereon; some of the witnesses stating that there was no ice, and only so much snow as had apparently been blown in and gathered around the corners and crevices of the platform; and others saying there was some ice formed on the edges of the platform from sleet, hail, or rain freezing there, and being thinly covered with a coating of snow. It had stormed at various times during the night and morning, and the weather was cold and freezing. Whatever may have been the testimony, it is quite certain that the quantity of either ice or snow was quite inconsiderable, and perceptible only after some inspection. It also appeared that, such as it was, it had been formed upon the platform of a passenger car attached to a through train, running from Chicago to Fort Wayne, in the course of its transit between those places. The plaintiff had taken his passage at Chicago for a place beyond Fort Wayne, and had been upon the cars about 12 hours, when, about 5 o'clock A. M., they arrived at Mansfield, in the state of Ohio, where the accident occurred. The jury were undoubtedly authorized to find from the evidence that there was some snow upon the car platform, and some slight spots of ice

around its edges, and that the accident was occasioned by the slipping of the defendant on the platform by reason of such ice or snow. There is no claim that there were hummocks or bunches of either substance, or that it lay in any other form than as a thin covering upon the platform. It was also established by the evidence of the plaintiff that he was aware of the condition of the platform at the time of the accident, as he had two or three times during the night crossed over it, and observed that it was slippery. The amount of the verdict rendered in the case is quite reasonable, and as the plaintiff was undoubtedly seriously injured, and was subjected to damage by reason thereof, we should be quite willing to affirm the judgment if it could be done without violating legal principles. Railroad corporations, however, are not the insurers of the lives or safety of passengers upon their cars, and, in order to render them so, it is essential to show that they have neglected the performance of some duty which in the exercise of reasonable care, prudence and diligence they owe to such passengers. We think the trial court was not justified in applying to this case the rule pertaining to the construction and maintenance of tracks and running machinery by railroad corporations, which holds them to the use of the utmost possible care in discovering and remedying defects therein. That rule is applicable to such appliances of a railroad as would be likely to occasion great danger and loss of life to the travelling public, if defects existed therein, on account of the velocity with which cars are moved, and the destructive and irresistible force which accompanies such motion. No claim is made here but that the road bed was in good order, the cars constructed upon the usual and customary plan, and provided with all the conveniences and appliances ordinarily used to afford safety and comfort to their occupants. It had a safe and well constructed platform, with proper and convenient steps, to enable passengers to safely enter or alight therefrom, and hand rails on either side to afford assistance in case of any insecurity in the footing of the passage way. The accident occurred from a cause which is as common to all other exposed places as to that of a car platform, and which is inseparable from the nature of a northern climate. Persons who suppose that they are freed from the exercise of reasonable care and prudence in passing over places exposed to ice and snow in such a climate as ours, upon the assumption that a duty belongs to some other person to keep such place under all circumstances absolutely free therefrom, greatly mistake the legal obligations resting upon the parties respectively interested. The rule laid down by the trial court in *Weston v. New York E. R. Co.*, as approved in 73 N. Y. 595, in reference to a permanent platform at an elevated railroad station in the city of New York, was that "the defendant was not bound to keep its platform in such a con-

**Liability of
railroad—De-
gree of care
required.**

dition that it would have been impossible for any passenger to slip, but in such a condition that a person using ordinary care, which people use when not apprised of danger, would not slip." This was applied in a case where the snow had fallen long before the accident and an effort had been made by the railroad company to remove it, but it had imperfectly performed that duty. We think even such a rule is not applicable to the removal of snow and ice on cars attached to a running railroad train travelling in the night during a continuous storm. The immediate and continuous removal of all snow and ice from such trains, or the covering of them with sand or ashes in such manner that no slippery places shall be at any time exposed, would be quite impracticable and beyond the duty which a railroad company owes to its passengers. The presence of snow or ice upon exposed places on moving cars is an accident of the hour, and no ordinary diligence could, during the prevalence of a storm, wholly remove its effects from the places exposed to its action, so as to prevent accidents to heedless and inattentive travellers. A passenger on a railroad train has no right to assume that the effects of a continuous storm of snow, sleet, rain or hail will be immediately and effectually removed from the exposed platform of the car while making its passage between stations or the *termini* of its route, and it would be an obligation beyond a reasonable expectation of performance to require a railroad corporation to do so. We are not referred to any case laying down the precise degree of care and diligence required of such corporations, under such circumstances; but we think it must be somewhat analogous to that imposed upon municipal corporations in respect to the removal of snow and ice from public streets. Those corporations are required to remove dangerous accumulations of snow or ice in a street or public place within a reasonable time after they have occurred, but they are not to be deemed negligent if they do not remove all traces of such obstructions when they do not constitute something more than the presence of a danger arising alone from their inherent quality of being slippery. *Taylor v. Yonkers*, 105 N. Y. 202; *Kinney v. City of Troy*, 108 N. Y. 570; *Kaveny v. City of Troy*, 108 N. Y. 572. The theory upon which the learned trial judge denied the motion for a nonsuit in this case is undoubtedly expressed in his charge to the jury, in which he says: "If you will pay attention you will understand the enormous responsibility which such a company assumes. The duty it owes the public is the utmost possible care to anticipate future accident or disaster, and the utmost possible prudence in guarding against it." Although this portion of the charge was unexcepted to by the defendant, and is therefore unavailable to it as an error of law upon this appeal, it may yet be taken as an expression of the views entertained by the court in respect to the law, in refusing

to grant the motion to nonsuit presented by the defendant. It is quite impossible to lay down any general rule applicable to all circumstances, in respect to the degree of care to be observed by a railroad corporation in the removal of ice or snow from its cars, and each case must therefore be generally determined by its own peculiar circumstances; but it is safe to say that such corporations should not be held responsible for the dangers produced by the elements until they have assumed a dangerous form, and they have had a reasonable opportunity to remove their effects. Having arrived at the conclusion that the case presented no facts as to the negligence of the defendant which a jury were justified in regarding as proof of negligence, we deem it unnecessary to discuss at length the question of the alleged contributory negligence of the plaintiff. A problem not free from doubt is presented by a verdict adjudging the defendant guilty of negligence in not observing the danger arising from the presence of snow and ice upon a platform, and yet exonerating the plaintiff from the imputation of contributory negligence, in view of the fact that he knew that ice and snow had accumulated on the platform; that he had twice slipped there the same night, and thereafter walked fearlessly over it, without availing himself to the protection of hand rails within his reach on both sides of the platform. The same duty which rested upon the defendant to see and remove this obstruction rested upon the plaintiff with still greater force, to guard himself from injury while passing over it, because he had been informed by experience of its presence and danger, and, as the storm continued until the train reached Mansfield, he should have known that no reasonable opportunity had been afforded the railroad company to effectually remove it. The judgments of the courts below should therefore be reversed, and a new trial ordered, with costs to abide the event.

All concur.

PENNSYLVANIA R. CO.

v.

MACKINNEY.

(*Pennsylvania Supreme Court, March 4, 1889.*)

Passenger—Personal Injuries—Presumption of Negligence.—The presumption of negligence arising from injury to a passenger is confined to cases where it is shown that the injury complained of resulted from the breaking of machinery, collision, derailment of cars, or something improper and unsafe in the appliances

of transportation, or in the conduct of the business, and has no application to a case where a passenger is injured through being struck by a hard substance while sitting at a window and whilst another train is passing the train upon which he is travelling,—at all events, when the employes of the railroad company testify that they knew nothing of the occurrence and had done nothing to bring it about, and the employes in charge of passing trains testify they had not thrown any substance from their engines or tenders and that none had fallen therefrom.

Same—Province of Jury.—When a passenger is injured through being struck by a hard substance whilst a train is passing upon the opposite line, the case ought to be sent to the jury, although there is evidence to the effect that none of the employes of the company were guilty of negligence contributing to the accident.

ERROR to Court of Common Pleas, Philadelphia County.

Action to recover damages for personal injuries sustained by the plaintiff, Herbert G. MacKinney, whilst travelling upon a train belonging to and operated by the defendant, the Pennsylvania R. Co. The defendant brings error to review a judgment for the plaintiff.

John Hampton Barnes and Geo. Tucker Bispham for plaintiff in error.

Mayer Sulzberger for defendant in error.

STERRETT, J.—In May, 1887, plaintiff below was a passenger on one of defendant company's cars, bound for Philadelphia.

Facts. While he was occupying the third or fourth seat from front end of the car, left side, next to an open window, and the train was running rapidly, some distance south of Trenton, he received a violent blow on the left eye, causing the severe and painful injury of which he complains. The nature of the injury indicated that he was struck by some hard substance, hurled with considerable force. Surgical examination of the eye, made on arrival at Philadelphia, showed that it was probably a piece of coal. Small particles of some hard substance resembling coal were found and removed from the injured organ. Plaintiff testified that the blow was so severe that it almost stunned him, and threw him back into his seat. He further said: "As I recovered, to an extent, from the shock, I covered the right eye to see if the sight was entirely lost, as I presumed the blow had burst the left eye. I found I could see a little, but I was suffering excruciating agony." The character of the injury and circumstances attending it were such that plaintiff had no opportunity for successful investigation, and, of course, he was unable to explain how it occurred. All he knew was that, at the time he was struck, he saw, through the open window at which he was sitting, one of the company's trains, passing in the opposite direction, immediately on the left of the train on which he was being carried; that, simultaneously with receiving the blow, the engine of that train was directly opposite the window, and

was thus interposed between him and that side of the railroad and land adjacent thereto. That fact, it was claimed by him, negatived any inference that the injury resulted from the act of a stranger, or anyone not connected with the operation of the road. His theory was that a piece of slate or coal was negligently thrown by the fireman or other employe on the passing engine, either in an effort to get rid of it, or in drawing or working at his fire, etc.; but, of course, that could not be assumed by the court as an admitted and established fact. While the circumstances in evidence tended to sustain the plaintiff's theory, the cause of the accident was not satisfactorily explained by either party. The company's employes in charge of the train on which plaintiff was, testified that they knew nothing of the occurrence, and had done nothing to bring it about. Other employes, in charge of passing trains, testified that they had not drawn or worked at their fires, or thrown off any slate, coal or any other substance from their engines or tenders, and that none had fallen therefrom. Evidence was also introduced to prove that all the appliances, machinery, etc., of the road, including the engines, were in good order, and that the latter were properly provided with approved spark-arresters, etc. There was no derailment of the train, no collision with any train or other object on the road, no breaking of any machinery connected with the south bound train, nor any evidence of anything wrong with the passing trains or cars.

In view of the evidence tending to prove a state of facts such as that above indicated, the defendant company presented four points for charge, in the first and fourth of which binding instructions to find for defendant were asked, Defendant's points—
on the ground that there was no evidence of negligence proper for the consideration of the jury. These Instructions.
points, we think, were rightly refused.

The other two points were as follows: "(2) Under the circumstances of the present case, no presumption of negligence arises against the defendant from the mere fact that the plaintiff was a passenger, and was injured while riding in the defendant's cars. (3) The burden of the proof is on the plaintiff to show that the injury for which he sues was occasioned by the defendant; and, under the circumstances of the present case, the burden resting on the plaintiff is not satisfied by the mere presumption of negligence which sometimes arises against the carrying company when a passenger is injured." The learned president of the common pleas also declined to affirm either of these points, and emphasized his refusal by charging *inter alia*, as complained of in the first specification of error, viz: "The rule of law, as applicable to this case, is that the mere happening of an injurious accident to a passenger while in the hands of a carrier will raise *prima facie* a presumption of negligence, and throws the *onus* that

it did not exist on the carrier. Under this principle and the facts in this case, the jury will begin their consideration with the fact established that the injuries were the result of negligence of the defendant. This fact must be rebutted or answered by evidence. In other words, the defendant must show by evidence that it was not negligent. If it has not done this, the verdict must be for the plaintiff." In immediate connection therewith he said to the jury: "It is your duty, of course, to consider all the evidence in the case, and to come to a conclusion on this question of negligence. If you find that the defendant was negligent, then the question of damages must be considered by you."

The rule clearly stated by the learned judge in the foregoing extract from his general charge is not only an old and well-set-

<p>Presump- tion of neg- ligence in case of in- jury to passenger.</p>	<p>tled principle of law, but one of very general application in cases of injury to passengers while in the course of transportation. The only question is whether it is of such universal application that it can be invoked without proof of something more than the mere fact of an injurious accident to a passenger while in the hands of the carrier, and in the absence of any admission or evidence tending to connect the latter or his servants, or any of the appliances of transportation, with the happening of the injury. The rule in question has been frequently recognized and the presumption of negligence applied in variety of cases, among which are stage coach accidents, resulting from breaking an axle, etc., railroad accidents, including derailment of cars, collisions, breaking of machinery, falling of berth of sleeping car, violent outbreak among other passengers on train, explosion on passenger vessel, etc. <i>Christie v. Griggs</i>, 2 Camp. 79; <i>Stokes v. Saltonstall</i>, 13 Pet. 181; <i>Ware v. Gay</i>, 11 Pick. 109; <i>Hipsley v. Kansas City, St. J. & C. B. R. Co.</i>, 27 Am. & Eng. R. Cas. 287; <i>Feital v. Middlesex R. Co.</i>, 109 Mass. 398; <i>Edgerton v. New York & H. R. Co.</i>, 39 N. Y. 229; <i>Sullivan v. Philadelphia etc. R. Co.</i>, 30 Pa. St. 234; <i>Cleveland, C. C. & I. R. Co. v. Walrath</i>, 8 Am. & Eng. R. Cas. 371; <i>Pittsburg etc. R. Co., v. Pillow</i>, 76 Pa. St. 510, 513; <i>Spear v. Philadelphia, W. & B. R. Co.</i>, 119 Pa. St. 61; <i>Packet Co. v. McCool</i>, 8 Am. & Eng. R. Cas. 390; <i>Laing v. Colder</i>, 8 Pa. St. 481; <i>Holbrook v. Utica & S. R. Co.</i>, 12 N. Y. 236; <i>Pennsylvania & R. R. Co. v. Anderson</i>, 94 Pa. St. 351; <i>Story, Bailm.</i> 592-601; <i>Shear. & R. Neg.</i> §§ 280, 280a, and notes.</p>
---	---

In nearly every case in which the rule under consideration has been applied, it will be found that the injury complained of was shown to have resulted from breaking of machinery, collision, derailment of cars, or something improper and unsafe in the appliances of transportation, or in the conduct of the business, and not from any cause wholly disconnected therewith. In *Laing v.*

Colder the plaintiff's arm was broken because the side of the bridge was dangerously close to the side of the track, but in that case there was evidence of contributory negligence, etc. The injury in *Sullivan v. Philadelphia etc. R. Co.* resulted from collision of the train with an obstruction on the track. *Pittsburgh etc. R. Co. v. Pillow*, the injury was caused by an outbreak of violence among other passengers in the car; and in *Spear v. Philadelphia, W. & B. R. Co.*, the injury resulted from an unexplained explosion on board a crowded steamer. In the latter case our Brother WILLIAMS summarized the controlling facts, and applied the rule thus: "The person injured was a passenger. The injury occurred after the carriage had begun, and the cause of the injury was an explosion on the boat, which was the vehicle or instrument of carriage, and which was under the exclusive care and control of the defendant's servants. The rule of law is that the 'mere happening of an injurious accident' to a passenger while in the hands of the carrier will raise *prima facie* a presumption of negligence, and throw the *onus* of showing that it did not exist on the carrier." Of course, the rule, as thus broadly stated, must be considered in connection with the facts which warranted its application, and this is so in regard to all the cases. The facts and circumstances connected with the injury complained of in each furnished a basis for the presumption of negligence. As was said in *Delaware, L. & W. R. Co. v. Napheys*, 90 Pa. St. 141, 1 Am. & Eng. R. R. Cas. 52, the general rule undoubtedly is that the party who alleges negligence as the basis of a claim for damages must prove the fact alleged, and the extent of the injury, if more than nominal damages are claimed; but in some cases, slight proof only is required to justify a presumption of negligence. The mere circumstances attending the injury, when put in proof, may be enough to cast the burden of exculpation on defendant. If a passenger seated in a railroad car is injured in a collision, or by the upsetting of the car, the breaking of a wheel, axle, or other part of the machinery, he is not required to do more, in the first instance, than prove the fact, and show the nature and extent of the injury. A *prima facie* case for the plaintiff is thus made out, and the *onus* is cast on the carrier to disprove negligence. It is reasonable that it should be so, because the company has in its possession and under its control, almost exclusively, the means of knowing what occasioned the injury, and of explaining how it occurred, while, as a general rule, the passenger is destitute of all knowledge that would enable him to present the facts and fasten the negligence on the company, in case it really existed. The contract to carry implies that the company is provided with a safe and sufficient road; that its cars are staunch and roadworthy; that every precaution which human skill, prudence and foresight could suggest has been taken to

guard against every apparent danger that may beset the passenger; and that the servants in charge are tried, sober and competent men. When a passenger is injured by any accident connected with the means or appliances of transportation, there naturally arises a presumption that it must have resulted from some negligent act of omission or commission of the company, or some of its employees; because, without some such negligence, it is very improbable that the accident would have occurred. That is the basis on which the presumption rests, and it stands as proof of negligence until it is successfully rebutted. It arises, not from the naked fact that an injury has been inflicted, but from the cause of the injury, or from other circumstances attending it. As a rule of evidence, the principle was approvingly recognized and applied in *Pennsylvania & R. R. Co. v. Anderson*, 94 Pa. St. 351, and other cases. In *Holbrook v. Utica & S. R. Co.*, *supra*, a case in some respects similar to the one before us, it appeared that at the moment plaintiff's arm was broken the passenger car in which she sat was opposite a boarding car, which had been placed on the adjoining track for the accommodation of the company's workmen. A long horizontal mark on the passenger car and other circumstances indicated that plaintiff's arm as well as the car had come in contact with some object of considerable size and strength, firmly fixed in its position, and probably connected in some way with the boarding car, and at the same time tended to negative any inference that the injury could have been caused by a stone or other missile thrown by any person outside. The immediate cause of the injury, however, was not explained. The case, having been submitted to the jury, with instructions to ascertain from the evidence whether the injury resulted from anything disconnected with the company or not, etc., a verdict in favor of the plaintiff was rendered. After stating the general rule as to the burden of proof, etc., the court of appeals said: "It generally happens, however, in cases of this kind, that the same evidence which proves the injury done, proves also the defendant's negligence, or shows circumstances from which strong presumptions of negligence arise, and which cast on the defendant the burden of disproving it. For example, a passenger's leg is broken while on his passage in a railroad car. This mere fact is no evidence of negligence on the part of the carrier until something further be shown. If the witness who swears to the injury testifies also that it was caused by a crash in a collision with another train of cars belonging to the same carriers, the presumption of negligence immediately arises; not, however, from the fact that the leg was broken, but from the circumstances attending the fact. On the other hand, if the witness who proves the injury swears that at the moment when it happened he heard the report of a gun outside of the car, and found a bullet in the

fractured limb, the presumption would be against the negligence of the carrier. It is incorrect, therefore, to say that the negligence of the carrier is to be presumed from the mere fact that an injury has been done to the plaintiff. The presumption arises from the cause of the injury, or from other circumstances attending it, and not from the injury itself." It follows from what has been said that the learned judge of the common pleas erred in directing the jury to begin their consideration of the case "with the fact established that the injuries were the result of negligence of the defendant." If the case had been submitted to the jury on the evidence, and they had found therefrom that the plaintiff's injury resulted from something connected with the operation of the railroad, and not from something entirely disconnected therewith, and with which neither the company nor its employes had anything whatever to do, that would have raised *prima facie* a presumption of negligence on the part of the company, and thrown upon it the burden of proving that it did not exist. Judgment reversed, and a *venire facias de novo* awarded.

WALLACE

v.

WESTERN NORTH CAROLINA R. CO.

(*North Carolina Supreme Court, December 10, 1888.*)

Negligence—Evidence—Former Trial.—Upon the second trial of an action to recover damages for personal injuries, it is error for the court to read, from the opinion of the appellate court upon the first trial, a statement to the effect that the train was a long one, when no evidence has been adduced on the second trial to that effect, and no instruction is given to the jury to disregard evidence adduced on the former trial.

Same—Evidence—Sufficiency—Province of Jury.—In an action to recover damages for personal injuries sustained while travelling in the caboose of a freight train, when there is evidence to the effect that the train had stalled and come to a sudden stop, that the plaintiff rose and stooped to pick up an overcoat from the floor of the car when there was a jolt so violent as to cause him to fall on the floor and break his thigh, an instruction that there was no evidence of overloading or negligent management, or that the injury was caused by mere accident, is properly refused.

APPEAL from Superior Court, McDowell County.

Action against the Western North Carolina R. Co. to recover damages for injuries sustained by the plaintiff, W. J. Wallace, whilst travelling in a caboose on a freight train on defendant's road. The testimony of plaintiff and a fellow-passenger was to the effect that the train, having stalled and come to a stop, plaintiff

arose from his seat and attempted to pick up an overcoat from the floor when the car was suddenly struck, and he was thrown forward and had his thigh broken. The defendant appeals from a judgment for the plaintiff. The case was before the supreme court on a former appeal, and the judgment having been reversed, was remanded for a new trial. For opinion on that appeal, see 34 Am. & Eng. R. Cas. 553.

Busbee & Busbee and *Charles Price* for appellant.

Batchelor & Devereux for appellee.

MERRIMON, J.—The plaintiff brought this action to recover damages occasioned by the alleged negligence of the defendant while it was transporting him as a passenger in a **Case stated.** “caboose car” attached to one of its freight trains over its railroad. One ground of negligence assigned was that the locomotive was overburdened, and as a consequence it stopped on a steep grade on the road, and in pushing the train back to a point from which it could the more readily start anew, it produced heavy jolts and jars, and while the plaintiff was standing on the floor of the car in which he was riding, there came a jolt so violent as to cause him to fall to the floor and break his thigh, etc. The case came before this court by a former appeal. 98 N. C. 494, 434 Am. & Eng. R. R. Cas. 553. On the former trial, as tending to show that the locomotive was overloaded, the plaintiff produced (along with the other evidence) evidence that “the train was a long one.” On the last trial there was no evidence as to the length of the train. But on this trial the court, in its instructions to the jury as to the law applicable, read to them a considerable part of the opinion of this court delivered in the former appeal, and particularly to the present purpose that part wherein the court said: “It is in evidence that the jerks and jars incident to the freight train were known to him; that on this occasion the train was a long one, and the locomotive was moving it with difficulty,” etc. The court did not qualify the reading, and caution the jury by telling them there was no evidence on the last trial as to the length of the train. The defendant assigned error that the courts so read the extracts recited at all, and particularly that it did so without explaining to the jury that there was no evidence on the trial then in progress as to the length of the train.

It is alleged in the complaint, among other things, that the defendant was negligent in that “the locomotive of the said defendant upon its said railroad was overloaded, causing it to stall,” etc. Such negligence is made one of the leading elements and constituent parts of the plaintiff’s alleged cause of action, and it was material to prove on the trial that the locomotive drawing the train on which the plaintiff was riding when he sustained the

injury complained of was overloaded. The evidence to prove this fact was not very clear, strong, and satisfactory, and evidence that the train was a long one would tend directly and materially to prove it, and in case of doubt might, no doubt, lead the jury to conclude that it was so alleged. There was no evidence produced on the last trial as to the length of the train. On the first one, it appeared that it was a long one; and when the court read from

Error in reading from opinion of supreme court.

the opinion of this court in the former appeal that there was such evidence, without a word of caution or explanation, the jury might reasonably have understood the court to instruct them that there was such evidence for them to consider. Certainly, the tendency of what was read to them as to the evidence in this very case was to mislead them, and we can see that that evidence, in connection with the other evidence as to whether or not the train was overloaded, may have been treated by the jury as controlling. If the train was not overloaded, and they so found the fact to be, they might have rendered a verdict in favor of the defendant. We do not mean to suggest that they ought or ought not to have done so in that case. The court should, in connection with its reading, from the opinion of this court, have cautioned the jury that they could not consider the evidence of the former trial, and that particularly there was no evidence on the last trial as to the length of the train. It was error to fail to do so, because the direct tendency was to mislead the jury,—perhaps materially. If it be said that the defendant's counsel ought to have called the court's attention to the misleading tendency of the extract from the opinion mentioned, read to the jury, it must be said in reply that such suggestion might have force if objection was not made in apt time, before the jury rendered their verdict. It does not, however, appear that objection was made in apt time. On the contrary, the case stated on appeal shows that the exception was taken before the verdict was rendered, so that the court had opportunity to make any correction it deemed proper.

Inasmuch as there must be a new trial, we deem it proper to add in respect to other assignments of error that we are of opinion that there was evidence to go to the jury tending to prove that the locomotive was overloaded, and of careless management of it; that the court could not properly instruct the jury, in the light of all the evidence, that the injury sustained by the plaintiff was the result of a mere accident; nor should it have said to them that, in view of all the evidence, the plaintiff could not recover; nor that, accepting the plaintiff's own evidence as true, he was chargeable with contributory negligence. What we have said in the former appeal in respect to contributory negligence was appropriate to be said in the last trial, in view of the evidence. There is error. The

Evidence of negligence—Sufficiency.

defendant is entitled to a new trial, and we so adjudge. To that end let this opinion be certified to the superior court.

It is so ordered.

MAXSON

v.

DELAWARE, LACKAWANNA AND WESTERN R. CO.

(*New York Court of Appeals, March 5, 1889.*)

Limitation of Action—Personal Injuries—Loss of Services.—An action by a husband to recover damages for the loss of his wife's services by reason of the latter having received bodily injuries through the defendant's negligence, is an action for personal injuries within the meaning of the N. Y. Code Civ. Proc. Sec. 383, subd. 5, and is subject to the limitation of three years prescribed thereby, and not to the limitation of six years applicable to actions for damages for injuries to property.

APPEAL from General Term Court, Seventh Department.

Action by Edward Maxson against the Delaware, Lackawanna & Western R. Co., to recover damages for the loss of his wife's services occasioned through personal injuries inflicted upon her by defendant's negligence. The defendant appeals from a judgment for the plaintiff.

Charles F. Bissell for appellant.

F. C. Peck for respondent.

GRAY, J.—The question presented by this appeal is whether the action was barred because it was not commenced within three years after the cause of action accrued. It was brought to recover damages alleged by plaintiff to have been sustained by him in the loss of his wife's services and of the comforts of her society, as the result of injuries inflicted upon her through the negligence of the defendant. The general term, in affirming the judgment of the special term which sustained plaintiff's demurrer to the defence of the statutory limitation, in their opinion held that, in so far as the plaintiff's cause of action was for the loss of his wife's services, it was an injury to property, and could be brought within six years. We think they were in error, and that the defence interposed was complete. Section 382 of the Code of Civil Procedure prescribes a limit of six years for the commencement of "an action to recover damages for . . . a personal injury, except in a case where a different period is expressly prescribed in this chapter." Such an exception is found in the following section of the Code (section 383, subd. 5), where a limit of three years is prescribed for the com-

Question presented.

Three years limitation a defence.

mencement of "an action to recover for a personal injury resulting from negligence." It might be supposed that the reading of these two sections would suffice for the conclusion that, where a cause of action existed for damages, in any way suffered by reason of an injury to the person through another's negligence, in order to escape the statutory defence of delay, it must be acted upon within the period of three years prescribed by section 383. But the opinion of the able judge at general term, and the authority which relies upon, in the case of *Groth v. Washburn*, 34 Hun, 509, are of such weight as to require some discussion of the question.

In *Webber v. Herkimer & M. St. R. Co.*, 109 N. Y. 311, 34 Am. & Eng. R. R. Cas. 580; we held that, where the source of the personal injury complained of is in the negligence of the defendant, the action must be commenced within three years, and that in all such actions against carriers of passengers, the liability of the defendant is based solely upon negligence. In this case there is no question but that the *gravamen* of the plaintiff's complaint is the alleged negligence of the defendant or of its servants, by reason of which his wife received bodily injuries of such a character as, in addition to causing her pain and suffering, disabled her from performing such services as a husband may be presumed to be entitled to on the part of his wife. The law gives to the husband, to the parent, and to the master a right of action for any injury to the wife, minor child, or servant, when caused by the actionable acts of another, *per quod servitum amisit*. This fiction of the law, which sustains such an action against others, is not without its admirable features; inasmuch as it gives a remedy for an injury to domestic rights, and serves as a check upon their molestation. At the bottom lies the personal injury suffered by the plaintiff, and, where it is suffered through the negligent conduct of the defendant towards the individual, whose relation to the plaintiff gives rise to the right to maintain the action, it is difficult to understand the argument that the limitation of time prescribed in section 383 does not apply. It is certainly a "personal injury resulting from negligence" in the defendant. To hold that the sense of these words is in their application to the body of the plaintiff seems as much a narrowing of the ordinary import of language as it is really contrary to the interpretation which we find given elsewhere in the Code.

By reference to subdivision 9 of section 3343, in the chapter of definitions in our Code, we find that a "personal injury" is "an actionable injury to the person, either of the plaintiff or of another." This provision was derived from the second section of chapter 449 of the Laws of 1876. As originally enacted there, a personal injury was "an actionable injury to the person of the plaintiff, or of his or her wife, husband, child, or servant." It is

evident that the legislature, in enacting subdivision 5 of section 383, whereby a limitation of three years is prescribed for the commencement of an action for a "personal injury resulting from negligence," has intended it to apply as well to actions growing out of an injury to the body of any of the persons enumerated in the section of the act of 1876 mentioned as to the plaintiff's own body. In the absence of language in the provision of the Code justifying it, we can see no reason for classifying separately, with respect to the chapter of limitations, those actions for a personal injury resulting from negligence which die with the plaintiff's death and those which survive to the administrator. Actions to recover damages for a personal injury must be commenced under the Code within six years in all cases, except that, for a personal injury resulting from negligence, the limitation of time is three years, and for libel, slander, assault, battery, or false imprisonment it is two years. How can the fact that the personal injury complained of has brought about a diminution of or loss to one's estate by reason of the expenses incurred or services lost effect the question of limitation if that injury resulted from defendant's negligence? The Code does not make the distinction.

In endeavoring to separate the cause of action, and to bring that portion which rests on the loss of service within the statutory limitation of six years, it is impossible to overcome the difficulty in the way of the endeavor, that the action arose out of the defendant's negligence, and thus is comprehended within the provision of section 382. But, further, it may be added that, though in an action for damages for an injury to property a limitation of six years is imposed, yet, by reference again to the chapter of definitions, we find in subdivision 10 of section 3343 that the legislature has excluded from the class of actions based on an injury to property actions arising out of a personal injury; for it reads: "An injury to property is an actionable act whereby the estate of another is lessened, other than a personal injury or the breach of a contract." I am not able to read that language in any other sense than that, when it is brought to recover on a cause of action based upon an injury to property, a cause of action based on a personal injury is not to be deemed included. The general term below have relied upon the case of *Cregin v. Brooklyn Crosstown R. Co.*, 83 N. Y. 595. What was decided there was that in an action for a wrongful injury to the person of plaintiff's wife, whereby he suffered damages in the loss of her society and services and in the attendant expenses, upon his death the right of action survived and vested in his administrators as to the damages for loss of services, etc., but abated as to damages for the loss of her society and its comforts. It was held in that case that, though the plaintiff's cause of action was single in one sense, his right of damages therefor was

compound, and consisted of diverse elements, and became separable upon his death as to the pecuniary loss by which his estate had been diminished. But no inference or conclusion is to be drawn from the decision of the court in that case, that because the personal injury complained of caused a diminution in the plaintiff's estate the action was converted into one for an injury to property. It is authority for the proposition that, in so far as the cause of action based on the personal injury is separable in its elements of damage, as to that damage which is tangible, in the sense that it is appreciable by those interested in the administration of the estate, *pro tanto* the cause of action, though growing out of a personal injury, may be continued, under the statute, by the administrator.

It would be an anomalous condition of the statute law if, while an individual would be limited in his right to bring an action for an injury to his body, resulting from the defendant's negligence, to the period of three years as to all elements of damage, yet if another, to whom the right might appertain to maintain an action for that same injury, sues, the time is enlarged to six years, on the theory that it was an injury to property. We do not find support for such a construction of the statute, and we do not believe any such condition of things was intended by the legislature.

The language of the Code in the fifth subdivision of section 383 is broad enough to cover every case where the action is founded on the fact of an injury occasioned to a person by negligence, whether the person is that of the plaintiff, or that of another individual, for whose injury the plaintiff is entitled to bring the action. The result of the injury in either case comprehends a loss to the estate, as well as bodily suffering and discomforts; and shall we say that, where the loss to the estate arises to the plaintiff from the injury to the person of another, a different rule as to limitation of time governs? In this case the wife's right to sue the defendant was lost by the lapse of three years, but it is proposed to give to the husband a right to maintain an action on the same ground and on the same proofs, but for the loss of her services, for six years from the time it accrued. We cannot concur in any such conclusion, and we think such an interpretation of the law to be unsound.

The judgment of the general term affirming the judgment at special term sustaining the demurrer should be reversed, and the demurrer overruled, with costs in all the courts to the appellant. All concur.

QUINN

v.

SOUTH CAROLINA R. CO.

South Carolina Supreme Court, October 11, 1888.)

Passenger—Contributory Negligence—Province of Court and Jury.—The question whether a passenger is guilty of contributory negligence by travelling upon a car with his arm projecting from the window, is a question of fact for the jury and it is not error for the court to refuse to charge, as matter of law, that he is guilty of contributory negligence.

Same—Exemplary Damages—Liability of Company.—If a passenger is injured by the malicious, oppressive or reckless negligence of the company's servants, the company is liable in exemplary damages, and it is not error to refuse to charge that the company is not so liable unless the injury was caused by the wilful negligence of company's servants, authorized or approved by the company, and showing a criminal and reckless misconduct on the part of the company.

APPEAL from Common Pleas Circuit Court, Charleston County.

Action by Thomas Quinn against the South Carolina R. Co., to recover damages for personal injuries sustained by plaintiff while travelling upon one of defendant's trains. The defendant appeals from a judgment for the plaintiff.

Brawley & Barnwell for appellant.

Bryan & Bryan for respondent.

MCGOWAN, J.—This was an action against the defendant company to recover damages for a personal injury. The plaintiff complained "that on October 5, 1886, the defendants received the plaintiff into one of their passenger cars for the purpose of conveying him therein and upon said railroad as a passenger, from the city of Augusta, Ga., to Charleston, for fare paid by the plaintiff to the defendants; that on October 6, 1886, while the plaintiff was in such car on said railroad, being so conveyed, near the depot of the said railway company at Charleston, a collision occurred on said railroad, caused by the negligence of the defendants and their servants, by which said car was struck, and the plaintiff was greatly injured, wounded, and bruised, and otherwise hurt and damaged, in his person," etc.; "to the damage of him, the said plaintiff, forty thousand dollars," etc. The defendant put in a general denial, and "admits that plaintiff received certain injuries while sitting in one of the passenger coaches or car of the defendant; but this defendant says that such injuries would not have been received, but for the negligence of the plaintiff in placing himself in a position in which his

arm extended from the window in said car, so as to come in contact with another train of defendant, colliding with the car in which plaintiff was sitting," etc. The cause came on to be heard before Judge Fraser and a jury. There was a great mass of testimony, which is all printed in the brief; but it is believed that the following brief statement of the defendant's attorney will sufficiently indicate the points of law to be determined by this court: "On the morning of October the 6th, Thomas Quinn, the plaintiff, was a passenger on the night mixed freight and passenger train from Augusta to Charleston. He was riding in the smoking car, called in the testimony 'Combined Car No. 7.' The train arrived in the station yard about six o'clock, but before daylight. It stopped at the switch just before entering the passenger station, and the freight cars and engine were uncoupled from the combined car. The freight cars went forward about thirty feet on the track called the 'Summerville Track,' outside of the station, and to the east of it, and stopped. A yard engine, called a 'switch engine,' then coupled on behind the passenger coaches, drew them back to get them clear of the 'frog' or 'switch,' and was signaled to stop, and then come back and push the passenger coaches into the station. Thomas F. Purse, an engineer of experience in charge of the engine and freight cars, which had been stopped on the Summerville track, understood the signal given to the switch engine to come back to mean that he must back his engine and freight cars, and he slowly backed, felt a jar as though he had 'coupled a car,' was signaled to stop, and did so, and then drew forward," etc. "The jar felt by Purse was a collision between stock car 31, the last car of the freight part of the train, and the smoking or combined freight and passenger car, in which Quinn was sitting, the foremost car of the passenger part of the train. As the passenger cars moved south, the eastern side of the combined car struck the western edge of the stock car moving north, and injured Quinn, who was seated at the open window on the eastern side of the smoking car, with his left arm on the window sill, and his head turned away from the window, while he was talking to a friend sitting behind him. Quinn's witnesses think his elbow was on the inside of the window, and the witnesses for the defence on the other side. Quinn's arm was so much injured that amputation above the elbow was necessary," etc.

Both the plaintiff and defendant made requests to charge, some of which were charged, some modified, and others refused; but it will not be necessary to encumber this opinion by setting out any but those to which there are exceptions. **Assignments of error.** Upon the charge of the judge the jury found for the plaintiff \$8,500, and the defendant company appeals to this court upon the following exceptions: "First. Because it is submitted that his honor erred in refusing to charge, as re-

quested by defendant, that if the jury find, from the evidence, that plaintiff, Quinn, was riding in the car of the company with his elbow at the time of the accident projecting out of the window of the car, by reason of which he sustained an injury, then plaintiff is *prima facie* guilty of contributory negligence. Second. That his honor erred in refusing to charge, as requested by defendant, that if the jury find, from the evidence, that plaintiff, Quinn, was riding in the car of defendant company with his elbow at the time of the accident projecting out of the window of the car, by reason of which he sustained an injury, he was guilty of a want of due care. Third. That his honor erred in refusing to charge, as requested by defendant, that plaintiff could not recover exemplary damages in this case, unless the jury find that the injury inflicted was caused by the wilful negligence of the company's servants, authorized or approved by the company, and showing criminal and reckless misconduct on the part of the company. Fourth. That his honor erred in refusing to charge, as requested by the defendant, that, no evidence of wilful misconduct having been offered by plaintiff, the jury could not find exemplary damages."

The first and second exceptions will be considered together, as they substantially make the same point—one insisting that it was error to refuse to charge that, if Quinn was riding in the car with his elbow projecting out of the window, "the plaintiff was *prima facie* guilty of contributory negligence;" and the other that by such conduct "he was guilty of a want of due care, and cannot recover." In refusing these requests the judge said: "As I understand the constitution of this State, I cannot instruct you upon matter of fact. What facts constitute negligence is for you. I cannot pick out any number of facts, and say to you that from these you may infer negligence. I think that is your province, gentlemen of the jury, and not mine; . . . that request is equivalent to giving my opinion, and I cannot do it. It is a question for you, and not for me." Under our cases we cannot say that this was error of law. We do not think it is necessary to do more than cite the rule as stated in the case of *Bridger v. Asheville & S. R. Co.*, 25 S. C. 30: "The judge is required to charge the law, and the jury to find the facts. The law, however, does not state what facts proved will show the absence of ordinary care. It could not do so as applicable to every case which arises. The cases involving this question are so difficult in their facts, so various, so complicated, and arising under so many different circumstances, that it would be utterly impossible to lay down any general principle of law by which every special case could be measured and tested as to the fact of negligence, and which would enable a judge to say to the jury, as matter of law, such and such

Plaintiff's
contributory
negligence—
Province of
jury.

facts showed the absence or presence of ordinary care. The general rule on the subject seems to be that the charge of the judge must simply be that negligence is the absence of ordinary care, and the jury must determine whether the facts proved before them amount to negligence. They must determine what facts have been proved, and then say by their verdict whether these facts amount to the absence of such care," etc. See *Carter v. Columbia & G. R. Co.*, 19 S. C. 29; 15 Am. & Eng. R. R. Cas. 414; *Crouch v. Charleston & S. R. Co.*, 21 S. C. 495; 29 Am. & Eng. R. R. Cas. 495; and *Kaminitsky v. Northeastern R. Co.*, 25 S. C. 59.

Exception 3. "That his honor erred in refusing to charge, as requested by defendant, that plaintiff could not recover exemplary damages in this case, unless the jury find that the injury inflicted was caused by the wilful negligence of the company's servants, authorized or approved by the company, and showing criminal and reckless misconduct on the part of the company." In this form the request was not charged. The court, however, did charge it in modified form, as follows: "The plaintiff cannot recover exemplary damages in this case, unless the jury find that the injury was caused by the malicious, oppressive, or reckless negligence of the company's servants. Now, these exemplary damages are sometimes called punitive damages, and sometimes vindictive damages. They are damages which the jury is authorized to give over and above the money value they put on the plaintiff's injury, by reason of some misconduct on the part of the defendant, and which the jury is authorized to give, so as to teach the defendant to behave better in the future. This class of damages is not only for the protection of the plaintiff, but also of the public," etc. Was this error? It seems that the question as to the responsibility of corporations in exemplary damages, for the misconduct of their employees, has never been much discussed in this state; but we regard at least the general principle, in cases of a particular character, as settled by *Palmer v. Charlotte etc. R. Co.*, 3 S. C. 583, and *Hall v. South Carolina R. Co.*, 34 Am. & Eng. R. R. Cas. 311. In the case of *Palmer* the court held that "a corporation may be made to respond in exemplary damages for the misconduct of its agents; as, for instance, a railroad corporation for the misconduct of a conductor in ejecting a passenger from the train." This certainly is in conformity to the generally received doctrine, as stated by all the elementary writers, and reported in numerous decided cases in other states. Without undertaking to cite the cases brought to our attention by the argument, it may suffice to state the rule as laid down by *Sutherland on Damages*: "If a corporation like a railroad company is guilty of an act or default, such as in the case of an individual would subject him to

**Exemplary
damages—
Misconduct
of employe.**

exemplary damages, they would be equally liable to such damages. And when the servants of a corporation, engaged in the carriage of passengers, are guilty of such acts or conduct in the performance of their duties, in the transportation of the injured party as a passenger, as would subject them to damages of this nature, the corporation is also liable to punitive damages, without proof that they directed or ratified such acts or conduct. As the corporation can only act through natural persons, its officers and servants, and as it, of necessity, commits its trains or vehicles absolutely to the charge of persons of its own appointment, passengers of necessity commit to them their safety and comfort *in transitu*, the whole power and authority of the corporation *pro hac vice* is vested in such employes, and as to such passengers they are the corporation." 3 Suth. Dam. 271. But it is insisted that the judge erred in not limiting the liability to cases in which "the jury inflicted was caused by the wilful negligence of the company's servants, authorized or approved by the company, and showing criminal and reckless misconduct on the part of the company." If this were the rule, we may safely say that few, if any, railroad companies would ever be made liable; for surely there is no company in this enlightened age which would authorize in advance, or after the act approve, any wilful negligence of their employes, by which personal injury was inflicted on their passengers. The principle is well established that when an agent is employed to do the work of the master he is the representative of the master, and any negligence on his part in the performance of the duty of the master thus delegated to him must be regarded as the negligence of the master." *Gunter v. Graniteville*, 18 S. C. 270. In the case of *Palmer v. Charlotte etc. R. Co.*, *supra*, the circuit judge said: "I charge you that there may have been no 'wilful design' on the part of this corporation, or any of its agents, to injure the plaintiffs; nevertheless you may find exemplary damages." The judgment was affirmed. In *State v. Railroad Co.*, 23 N. J. Law, 369, it was said that "if a corporation has itself no hands with which to strike, it may employ the hands of others; and it is now perfectly well settled, contrary to the ancient authorities, that a corporation is liable *civiliter* for all torts committed by its servants or agents, by authority of the corporation, express or implied. . . . The result of the modern cases is that a corporation is liable *civiliter* for torts committed by its servants or agents precisely as a natural person, and that it is liable as a natural person for the acts of its agents done by its authority, express or implied, though there be neither a written appointment under seal, nor a note of the corporation constituting the agency, or authorizing the act," etc. Mr. Thompson, in his work on Carriers of Passengers,

says: "The rule which is in accord with reason and the weight of authority is that passenger carriers, although corporations, may be liable in a proper case, in exemplary damages, for injuries to passengers carried by their agents, without direct authorization or subsequent ratification of the act complained of." Mr. Pearce, in his works on Railroads (305), says: "Although compensation for the injury is the usual measure of damages, other damages in addition have been allowed, when the author of the injury committed it maliciously, wilfully, or even recklessly, or, according to some authorities, with gross carelessness. Such supplemental damages are called 'exemplary,' etc. We think there was no error in the judge refusing to charge the proposition, as a whole, submitted by the defendant.

Exception 4. "Because the judge refused to charge, as requested by the defendant, that, no evidence of wilful misconduct having been offered by plaintiff, the jury cannot find exemplary damages." The judge said: "I prefer not to charge you on the fourth proposition. If I read it, and refuse it, it might convey a wrong impression. I prefer not to read the other propositions asked for the defendants, and to let the case go to the jury as it is." In the view which the judge took, it was considerate to pass over the request in silence. He could not charge the whole proposition as good law; for we have just endeavored to show that there may be exemplary damages when there is no "wilful misconduct." Besides, the request asked the judge to charge upon the facts, which in itself would have been error. The defendant insists, however, that it was a question for the court to decide whether any evidence was offered justifying exemplary damages. We do not know certainly what was the view of the judge. He might not have been clear that there was no such recklessness or gross negligence as authorized exemplary damages. We cannot say that the judge erred in leaving to the jury the whole subject of damages. The action was one of sounding in damages, and peculiarly for the jury. Courts are more reluctant to grant new trials for excessive damages in actions for personal injury than in any other class of cases. The judgment of this court is that the judgment of the circuit court be affirmed.

SIMPSON, C. J., and MCIVER, J., concur.

Contributory Negligence—Pleading.—If the cause of action for personal injuries is stated in the petition and contributory negligence cannot be inferred from the plaintiff's allegation, the defence that the plaintiff was injured through his own act must be pleaded in order to render it available. *Missouri Pacific R. Co. v. Watson (Tex.)*, 10 S. W. Rep. 731.

Recovery of Exemplary Damages for Torts of Servants.—See *Lake Shore, etc.*,

R. Co. v. Rosenzweig, 26 Am. and Eng. R. R. Cas. 489; Western & A. R. Co. v. Turner, 28 Am. and Eng. R. R. Cas. 455, and note, 458; Philadelphia Traction Co. v. Orbann, 34 Am. and Eng. R. R. Cas. 432; Dillingham v. Anthony, *ante*, p. 1.

Injury to Passenger Riding with Arm Projecting from Car Window.—See Breen v. New York etc. R. Co., 34 Am. and Eng. R. R. Cas. 523; Hallohan v. New York etc. R. Co., 26 Ib. 169; Farlow v. Kelly, 11 Ib. 104, note, 106; German-town Pass. R. Co. v. Brophy, 16 Ib. 361; Dun v. Seaboard etc. R. Co., 16 Ib. 363.

CASEY

v.

CANADIAN PACIFIC R. CO.

(15 Ont. Rep. 574.)

Personal Injuries—Failure to Look—Station—Contributory Negligence.—The defendants' station at A. was on what was known as the side track, between which and the main track there was a center platform for passengers alighting from and getting on to trains on the main track. The plaintiff had come to the station to meet a friend, and was attempting to cross over the side track to reach the center platform, when the engine and tender which had been detached from the rest of the train and switched on to the side track, and were backing down to pick up a car some fifty yards distant, ran over and injured him. The plaintiff was looking in the opposite direction from that from which the engine and tender were coming, and therefore did not see them; and it appeared that had he been looking out he must have seen them before he attempted to cross, and so could have avoided the accident, as it was only a second or two from the time he started to cross until he was struck, and there was no obstruction to his view. In an action for damages the jury having disagreed, *Held*, that the plaintiff's evidence having shown that the accident was caused by his own negligence and want of care, the defendants were not liable; and judgment was ordered to be entered for them.

Same—Ringing Bell—Statutory Requirement.—The statutory obligation to ring the bell, or sound the whistle, only applies to a highway crossing, and not to an engine shunting on defendants' own premises.

ACTION to recover damages for personal injuries.

The statement of claim alleged that at the station of defendants at the village of Arthur, on the 3d June, 1886, a train of cars belonging to the defendants was moving reversely along the railway, the engine being in the rear, and the defendants neglected to station on the last car of the train a person who should warn persons standing on or crossing the track of the railway of the approach of the train, nor did they, although it was dark, have any light or other warning on the last car of the train, nor was any warning given the plaintiff by the servants of the defendant of the approach of the train whereby, and by the negligence of the servants of the defendants, the plaintiff, who was lawfully, and without

negligence on his part, crossing the track in front of said train, was run over by the train, and had his leg fractured.

The defendants denied all the allegations of the claim.

They claimed that the plaintiff had no right to cross their tracks in the manner in which he did, and that he did so at his own risk and for his own convenience, and that he was guilty of contributory negligence; and alleged that they had complied with all the requirements imposed upon them by statute, and exercised all due care and caution.

The action was tried before GALT, C. J., and a jury, at Orangeville.

At the conclusion of the case, the learned Chief Justice submitted several questions to the jury, none of which were answered; and the jury, being unable to agree, were discharged.

An order *nisi* was granted calling upon the plaintiff to show cause why, notwithstanding the disagreement of the jury and their failure to answer the questions submitted, the action should not be dismissed, on the ground that there was no evidence to go to the jury of negligence on the part of defendants; and on the ground that by reason of plaintiff's own negligence in crossing the track without looking, the action should have been dismissed by the learned Chief Justice; that the evidence showed without contradiction that the defendants had observed all proper precautions to protect persons crossing the track and to discharge any duty which may have rested upon them.

G. T. Blackstock in support the order.

James Reeve contra.

MACMAHON.—The defendants' station at Arthur is on the south side of what is known as the side track of the railway, and between that and the main track there is a platform for the convenience of passengers alighting from and getting on the railway carriages on the main line. Facts.

The mixed train from the east reached the station on the main line at 8.24; and the plaintiff, who was coming from the village of Arthur to the station to meet a Miss Healey, who was to arrive by that train, says the train had stopped before he reached the station platform, where Miss Healey then was. He conversed with her a few minutes, and understood from a remark she made that she had forgotten her rubbers in the car she had just left. The plaintiff at once turned to cross the side track, intending to tell Mr. Gordon, the station master, who was then standing on the center platform, about the rubbers; and he had just reached the side track from the platform when the engine and tender, which had been detached from the train, and were backing down from the west on the side track to pick up a car standing about fifty yards to the east of the station, ran over him, causing the injury

complained of. In his examination in chief, the plaintiff gives an account of his movements on leaving the station platform, and said, in reply to questions by counsel:

Q. How far had you got on the side track when you came in contact with the tender? A. I think I was about half way across when they backed on to me, near the center of the track. Q. Describe now just what happened; how the accident occurred; what you saw, and so on? A. Well, I saw the back of the tender when it ran up to me; I caught hold of something on the back with my hand. Q. How far was it from you when you saw it? A. It was just on me; some person hollowed to me to look out; I turned kind of half round; I caught hold of the back of it with my hand, and was shoved on a piece ahead of it, or scrambled on ahead with it; it shoved me along with it.

On cross-examination by Mr. Blackstock, the plaintiff said:

Q. I understand you to say you would not have gone across to the platform between the siding and the main track if it had not been for something Miss Healey said about rubbers? A. No. Q. At the time you started to go there you supposed the engine was on the main track? A. Yes. Q. And at the head of the train on which Miss Healey had come? A. Yes. Q. You told my learned friend when you turned to come away from Miss Healey you turned towards the east? A. Yes; I turned around to my right, turning my face in the opposite direction to that in which the engine was coming; I stepped down. Q. That is why you could not see the engine? A. Yes. Q. Now, how long was it between the time you stepped from the platform and the time you were injured? A. Well, it would be only a second or so. Q. When you turned towards the east you say you saw this box car? A. Yes; I saw a car down there. Q. How far was that box car which you saw to the east from you? A. I would judge between forty or fifty yards; I never measured the place. Q. According to your judgment you think it would be about one hundred and fifty feet away from you? A. I think about fifty yards, as near as I can judge by looking. Q. Then there is no doubt that the box car which you saw was very much further away than the engine from you when you started to cross the track? A. I did not know where the engine was, because I did not see it. Q. Now, if the engine struck you a second or two after you left the platform, the engine must have been very near on top of you when you got on the track? A. Well, I did not see it. Q. You are a man of intelligence—you can reason that out? A. I do not know what distance it was; I did not see it. Q. Be candid, now; what is your belief about that? A. I cannot tell how far it was off; I have no doubt the engine may have been nearer to me than

the box car was. Q. Now, is your story true about that, because it is a very important point, and you have sworn to it; I want to see if you are going to stick to it, going to tell the jury it was not more than a second or so after you left the track before you were struck? A. Yes. Q. Then you did not see the engine until you were struck, you told my learned friend? A. No; I did not see it. Q. Then, of course, Mr. Casey, you did not look up the track to see? A. Well, of course, I gave a glance when I left the station. Q. Now, was there anything to prevent your seeing it? A. I do not know; I did not see anything on the track. Q. So that is the fact, isn't it; there was nothing between you and the engine? A. Not that I saw. Q. And there was nothing to prevent a look; there was nothing to prevent your seeing; that is so, isn't it? A. Well, I took a look up the track and down when I was leaving the station platform. Q. If you had taken the precaution to look, there was nothing to prevent your seeing? A. I do not know; I did not see anything. Q. Then did you stop at all between the time you left Miss Healey to go across the track and the time you were struck? A. I stopped when they hollowed to me, and kind of turned round or half round, and they struck me. Q. Which way did you turn? A. To the right, towards the direction in which the engine was coming; I walked on from the time I left her until the time they hollowed and I was struck. Q. Up to the time you turned around that way you did not see the engine at all? A. No; at that time it was right on me; it struck me as soon as I turned around to look; I saw the back of the tender then. Q. Where were you when you heard the cry—somebody called to you to look out? A. I was somewhere between the two rails on the siding. Q. Had you one foot over the south rail? A. I was walking in between the rails, just off the step into the center of the two rails, as I understand. Q. Had you one foot over the south rail—that is, the rail furthest away from the platform where you were standing talking to Miss Healey? A. No; I had not my foot over that. Q. It would be very difficult for you to recollect your position at the time you were struck? A. Well, I know I was between the rails; I cannot say the precise spot.

On re-examination by Mr. Meyers, he said:

Q. When you started from Miss Healey, how many steps had you to take before you got on this track? A. I think I made one step on the platform, and I made another step off the platform on to the track. I think that is all before I got on to the track.

Miss Healey, who was called as a witness for the plaintiff, said:

Q. When he started to go from you towards Mr. Gordon, how

far was he from the edge of the platform of the station? A. Not more than three or four feet. Q. How many steps would he require to take? A. About three steps; I could go in three steps myself. Q. How far was the near rail of the switch from the edge of the station platform upon which you were standing? A. I think one step would be sufficient to reach that. Q. Do you know, when he turned round to leave you, which direction he turned in? A. I cannot say as to that. Q. Did you see him stop on the track? A. I saw him stop on the track when the yell was given. Q. Who gave this yell? A. I do not know, sir; the yell was to leave the road, I think; there were quite a few people standing around, but I was a stranger among them, except to two.

On cross-examination, she said:

Q. And within a few seconds after he left you he was struck? A. Yes; I would not think it would be any more than a second or two before he was struck; the distance from me to the first rail would be about three steps. Q. Did he take those steps rapidly? A. I would not say to that. . . . Q. I am not asking you that; I am asking you whether you had been paying any attention to the engine up to this time—not to the train, but to the engine? A. No, sir. Q. But the first you saw was just as he stepped from you on to the track the engine struck him? A. Yes. Q. All done in the twinkling of an eye? A. Yes; I heard a yell, but I could not say who gave it. Q. It was still quite light? A. Yes; it was quite light.

Matthew Bunting, the brakeman on the train, said, in evidence, that he went on the engine to the switch, and turned the switch to permit the engine to back up on the side track. He then went to the back of the tender, and sat on the board that runs across the tender while the engine was backing down on the side track. He saw some person get off the platform on to the track, at which time the engine was about eighty feet from the man, and, when about ten feet from the man, he gave a signal to the engine driver to stop by throwing up his arms and hollowing.

The evidence is, that the engine, whilst backing down, was going at the rate of between three and four miles an hour; and it is stated by two or three witnesses that an engine running at that rate of speed can be brought to a stand within the length of the engine and tender—forty to fifty feet. The affirmative of the issue being on the plaintiff to establish what he is bound to do in order to entitle him to recover against these defendants, the question is, has he, on the undisputed facts as disclosed in his own evidence and that of Miss Healey, called as a witness on his behalf, made out such a case as entitled the plaintiff to have

Right to
have case
submitted
to jury.

it submitted to the jury? or, what is the same thing, are the undisputed facts, on the plaintiff's own evidence, of such a nature as to show that the accident resulted from the want of ordinary care on the plaintiff's part, and that therefore the learned Chief Justice should have dismissed the action.

At the time the plaintiff started to cross the side track he supposed the engine was still on the main track, and, assuming that to be the case, he started to cross, and, as he started, turned his face in the opposite direction to that from which the engine was coming; and that, he says, is the reason he did not see the engine, and from the time he stepped from the platform to the track and received the injury, it was only a second or so.

**Plaintiff's
contributory
negligence—
Assumption
of risk.**

There was no obstruction in his way to prevent his seeing the engine, and, on looking eastward, it was light enough for him to see the car, fifty yards distant, which the engine intended to pick up; and Miss Healey says "it was quite light;" and the evidence for the defence is to the same effect.

It is, therefore, apparent that the plaintiff undertook to cross the track without taking the precaution to look in the direction from which the engine was coming. Had he looked he must have seen the engine coming down the track in close proximity to where he intended to cross; and, had he seen the engine and chosen to make the attempt at crossing, and was injured, the risk would be his and his alone. If the plaintiff could have seen that the engine was in close proximity to him by looking in that direction, but did not take the precaution to look prior to crossing, and is injured while so crossing, is the risk he was assuming not also his risk?

I think it was his risk in the last case put just as much as in the hypothetical case first put, unless the defendants, by the omission of some duty cast upon them, have been the proximate cause of the injury which the plaintiff has sustained.

One act of negligence charged against the defendants was, in not complying with the requirements of the 52d section of the Railway Act, R. S. C., c. 109, which enacts that, "Whenever any train of cars is moving reversely in any city, town, or village, the locomotive being in the rear, the company shall station, on the last car in the train, a person who shall warn persons standing on or crossing the track of such railway of the approach of such train."

**Failure of
defendants
to give
warning.**

The words used in the above section, "train of cars," may mean something more than an engine and tender.

This point it is, however, not necessary to decide in the present case.

If the station was within the limits of the village of Arthur,

and if the engine and tender can be considered a "train of cars," then the defendants have complied with the statutory obligation by having a man stationed on the rear part of the tender who warned the plaintiff, but not in time to prevent the accident.

It would be almost an impossibility to prevent the accident, because, when the plaintiff started to cross he was only about three steps from the rail, and had, according to his evidence, only reached between the rails when they "hollowed," and he was struck by the tender.

Were the engine and tender to be regarded as a "train of cars," then the evidence of Matthew Bunting shows he was stationed on the rear of the tender while backing up; and his evidence is supported by the engineer and fireman on the engine. So that, if it had been necessary to submit that question to the jury, their finding must have been in favor of the defendants.

The other ground of negligence charged was, that the bell was not rung; and a great deal of evidence was taken as to that. The statutory obligation imposed upon railways to ring a bell or blow a whistle applies only to the occasions when the engine approaches a place where the railway crosses the highway; and that obligation does not arise where, as in this case, the engine was shunting on the defendants' own premises: R. S. C., c. 109, sec. 25, sub-sec. 7.

It may be that ringing a bell would be a necessary precaution to take in running over a track which passengers and others are obliged to cross to reach the main track; but, as to that, I express no opinion, as I consider the injury sustained by the plaintiff was attributable solely to that want of care which an ordinarily prudent man would have exercised; for had that care been exercised the accident could not have happened.

In *Davey v. London & Southwestern R. W. Co.*, 12 Q. B. D., 70, in appeal, Bowen, L. J., at p. 77, says: "It was broad daylight, and as soon as he" (the plaintiff) "had entered the wicket gate—had he been a sensible man, he would have looked up and down the line to see if there was a train coming either way. A train was, in fact, so close to him that he was only able to cross fifteen feet before he found himself between its buffers, and yet he never took the trouble to look and see if the train was coming. Now, is it open to any reasonable mind to draw the inference that that accident was caused by anything except the gross negligence of the man who never looked at a train which was within a few feet of him?"

See, also, the observations of Lord Cairns in *Dublin Wicklow, etc., R. W. Co. v. Slaterry*, 3 App. Cas. 1155, at p. 1166.

In the case of *Commissioner for Railways v. Brown*, 57 L. T. N. S. 895, Lord Fitzgerald, in giving the judgment of the Privy Council, at p. 896, in speaking of the respondent's (the plaintiff's)

conduct, says: "It was a matter of seconds. The delay of a few seconds would have prevented this calamity, but he chose to make a rush across, and, in fact, instead of the motor running into him he ran into the motor."

A few seconds would suffice, after the plaintiff left Miss Healey, for the tender to reach the place where the plaintiff crossed; and, in fact, he states it was only a second or so after he reached the track before he was struck by the tender; so that, instead of the tender running into him, he ran into the tender.

To reiterate the language of Bowen, L. J., in *Davey v. London & South Western R. W. Co.*, and apply it to this case, "Is it open to any reasonable mind to draw the inference that the accident to the plaintiff was caused by anything but the gross negligence of the man who never looked at a train which was within a few feet of him?"

We think that on the undisputed facts in the present case, had the jury found in the plaintiff's favor, their finding could not have been allowed to stand. We think the learned Chief Justice should have dismissed the plaintiff's action at the trial.

We order that the plaintiff's action be dismissed, and judgment entered for the defendants, with costs.

GALT, C. J., and ROSE, J., concurred.

Passenger—Contributory Negligence—Province of Jury.—Where a railroad company constructed its platform for the accommodation of passengers getting on and off its cars between a side track and the main line track, the distance between the two tracks being about six feet, and where a passenger approaching the train for the purpose of taking passage sought to enter the train from the platform of the rear car, and upon approaching the door found that that portion of the car into which the door opened was set apart exclusively for baggage, and then sought to leave the car, and enter a passenger car, by stepping upon and passing along the platform between the two tracks to the passenger car, but, finding the platform crowded with other passengers, he sought to pass through and around the company of passengers, but in doing so was struck by a passing train, moving at a rapid rate of speed, it was held that the question of his want of care was properly submitted to the jury, and that his conduct was not such as would require the court to declare it negligence. *Union Pacific R. Co. v. Sue* (Neb.), 41 N. W. Rep. 801.

SEARLE'S ADMR.

v.

KANAWHA AND OHIO R. CO.

(*West Virginia Supreme Court of Appeals, March 9, 1889.*)

Passengers—Injuries—Pleading—Damages.—In an action under the West Virginia statute (chapter 103, Code), to recover damages for causing the death of a party, the declaration is not demurrable simply because it names the widow and

children of the decedent, and avers that the damages claimed by the plaintiff accrued to them. Such parts of the declaration will be treated as surplusage.

Same—Sufficiency of Allegations.—The declaration, in an action under said statute, which avers that the decedent was killed by the oversetting and throwing down of the railroad car in which he was at the time being carried by the defendant as a passenger, and that said oversetting and throwing down of the car was caused by the negligence of the defendant, is not demurrable on the ground that the allegation is too general.

Same—Duty of Company—Elements of Damage.—The following instructions are not erroneous in an action brought under said statute to recover damages for the causing of the death of a husband and parent by the negligence of a railroad company: "(2) The law, in tenderness to human life and limbs, holds railroad companies liable for the slightest negligence, and compels them to repel by satisfactory proofs every imputation of such negligence. When carriers undertake to convey passengers by the powerful but dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence. (3) The Kanawha & Ohio Railway Company, as a common carrier of passengers, was bound to exercise the utmost degree of diligence and care in safely transporting Daniel Searles upon his journey. (4) The slightest neglect against which human prudence and foresight might have guarded, and by reason of which his death may have been occasioned, renders such company liable in damages for such death. (5) Said railroad company is held by the law to the utmost care, not only in the management of its trains and cars, but also in the structure, repair, and care of the track and bridges, and all other arrangements necessary to the safety of passengers. (6) The jury are instructed that in estimating the pecuniary injury they may take into consideration the nurture, instruction, and physical, moral, and intellectual training which the children would have received from their father. (7) The jury are instructed that while they must assess the damages with reference to the pecuniary injuries sustained by the distributees in consequence of the death of Daniel Searles, they are not limited to the losses actually sustained at the precise period of his death, but may include also prospective losses, provided they are such as the jury believe from the evidence will actually result to the distributees as the proximate damages arising from the wrongful death."

ERROR to Circuit Court, Mason County.

Trespass on the case for damages for negligently killing plaintiff's intestate.

Geo. S. Couch for plaintiff in error.

Gunn & Gibbons for defendant in error.

SNYDER, P.—Action of trespass on the case commenced in June, 1886, by T. M. Harbour, as administrator of Daniel Searles, deceased, against the Kanawha & Ohio Railway Company, in the circuit court of Mason county. There was a demurrer to the declaration, which was sustained, and then an amended declaration was filed, to which and to each count thereof the defendant demurred, and this demurrer was overruled. Issue was joined on the plea of not guilty, and upon two special pleas denying that the plaintiff was, or ever had been, administrator of Searles. The action was tried by jury, a verdict returned for the plaintiff for \$3,000, which the defendant moved the court to set aside, but the court overruled this motion, and entered judgment on the verdict, and the defendant obtained this writ of error. The defendant

Case
stated.

in error complains that the circuit court erred in sustaining the demurrer to the original declaration. The record shows that after the court sustained this demurrer the plaintiff was given leave to file an amended declaration, which he afterwards did, without objection. This operated as a waiver of any objection to the action of the court in sustaining said demurrer, and the amended declaration, when filed, superseded the original, and became the only declaration in the case. It is too late to make an objection of this character for the first time in the appellate court. The plaintiff in error, the railway company, insists that the court erred in overruling the demurrer to the amended declaration: First, because each of its three counts are bad, for the reason that they allege the damages claimed by the plaintiff accrued to the widow and children of the intestate; and, second, because the second count is bad for the further reason that it fails to aver how, and in what respect, the defendant was negligent.

1. Each count of the declaration, after alleging that the plaintiff's intestate was killed by the negligence of the defendant while being carried as a passenger upon one of its trains, avers that by reason of the premises the said widow and children of the decedent (naming each of them), have sustained damages to the amount of \$10,000. And in its general conclusion the declaration avers that by reason of the matters contained in the first, second, and third counts, and by force of the statute, an action has accrued to the plaintiff, as administrator as aforesaid, to have and demand from the defendant damages to the amount of \$10,000. In *Baltimore & O. R. Co. v. Gettle*, 3 W. Va. 376, which was an action brought under chapter 98, Acts 1863, it was held that the declaration was fatally defective for the reason that it failed to aver that the decedent had a widow or next of kin. After that decision the statute was changed so as to provide that the amount recovered shall be distributed to the parties entitled under the law to the personal estate of the decedent, but it shall not be liable for his debts, instead of providing, as the statute then did, that the amount recovered shall be for the exclusive benefit of the widow and next of kin of the decedent. Since this modification of the statute it has not been regarded as essential that the declaration should aver that the decedent had a widow or next of kin, or to mention his distributees by name or otherwise, and I think such is the proper interpretation of the statute. *Baltimore, etc. R. Co. v. Wightman*, 29 Grat. 431. But while it is not necessary to name the distributees, and allege that the action is for their benefit, still I do not think the making of such averment will be fatal to the declaration, but that it ought to be treated simply as surplusage. It seems to me this should be so treated, under section 29, c. 125, Code 1887, which declares that

Sufficiency
of declara-
tions—
Demurrer.

on demurrer no defect shall be regarded, unless it be so essential that judgment cannot be given according to law and the very right of the case. I think, therefore, this objection is not well taken.

2. The other ground relied on in support of the demurrer is that the second count of the declaration is too general in that it fails to aver how, or in what manner, the defendant's car was upset and thrown down, whether by a defect in the car, the track, or carelessness of its employes, or otherwise. The averment is, in substance, as follows: The defendant, not regarding its duty, conducted itself so carelessly, negligently, and unskillfully, that by reason thereof and the default of the defendant and its servants, and for the want of due care and attention, the car in which the said Searles was being carried was upset and thrown down, by means whereof the said Searles was greatly wounded and injured, and by reason thereof he died. Under the decisions of this court in *Blaine v. Chesapeake & O. R. Co.*, 9 W. Va. 252; *Hawker v. Baltimore & O. R. Co.*, 15 W. Va. 628; and *Berns v. Coal Co.*, 27 W. Va. 285, we must overrule this objection to the declaration, and hold that its averments were sufficient. It avers that the decedent was killed by the upsetting and throwing down of the car, and that this was caused by the negligence of the defendant. This, it seems to me, is a sufficient averment of the negligent act which caused the injury, under the law of this State, as modified by our statutes, though it may not be such as required by the rigid rules of pleading of the common law. 2 *Thomp. Neg.* 1246, § 26; *Jeffersonville, M. & I. R. Co. v. Dunlap*, 29 Ind. 426; *Chicago, B. & Q. R. Co. v. Harwood*, 90 Ill. 425. The demurrer to the declaration was, therefore, properly overruled.

It is further assigned as error by the plaintiff in error that the court improperly refused to instruct the jury that the evidence of the plaintiff was insufficient to prove that the plaintiff was or ever had been legally appointed administrator of Daniel Searles. In order to prove such appointment the plaintiff introduced an order of the county court of Putnam county, dated March 15, 1886, in these words: "The clerk of this court presented here a list of fiduciary appointments by him made in vacation since the first day of the last regular term of this court, which list being seen and inspected by the court, it is ordered that each of the appointments be, and the same is hereby, confirmed." In connection with this order the plaintiff read in evidence a list upon which it appears that the plaintiff was appointed administrator of said Daniel Searles on February 27, 1886. It is contended that this was simply a private list of

Sufficiency of allegations as to killing.

Plaintiff's appointment as administrator—Proof.

the clerk, and that the order of confirmation referred to this list, and did not, therefore, confirm any appointment of which the clerk had made a record, as required by the statute. It would certainly have been better and more formal for the order of the county court to show that the clerk had reported, that is, exhibited, to the court the record of the appointments made by him in vacation; but, in the absence of any fact tending to show that the list referred to in said order was not the recorded list of the clerk, it seems to me the court ought to presume that it was the recorded list, and that the order of confirmation referred to the appointments made and recorded by the clerk. To hold otherwise would be extremely technical, and, I think, unwarrantable.

The court gave to the jury eight instructions at the instance of the defendant, and the same number at the request of the plaintiff. To the giving of the latter, or any of them, the defendant objected, but no objection is made to any of them in this court, except Nos. 2, 5, 6, and 7, which are in these words: "(2) The law, in tenderness to human life and limbs, holds railroad companies liable for the slightest negligence, and compels them to repel by satisfactory proofs every imputation of such negligence. When carriers undertake to convey passengers by the powerful but dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence. Any negligence or default in such cases makes such carriers liable in damages under the statute." "(5) Said railroad company is held by the law to the utmost care, not only in the management of its trains and cars, but also in the structure, repair, and care of the track and bridges, and all other arrangements necessary to the safety of passengers. (6) The jury are instructed that in estimating the pecuniary injury they may take into consideration the nurture, instruction, and physical, moral, and intellectual training which the children would have received from their father. (7) The jury are instructed that while they must assess the damages with reference to the pecuniary injuries sustained by the distributees in consequence of the death of Daniel Searles, they are not limited to the losses actually sustained at the precise period of his death, but may include also prospective losses, provided they are such as the jury believe from the evidence will actually result to the distributees as the proximate damages arising from the wrongful death."

**Instruc-
tions on
behalf of
plaintiff.**

Of the said instructions Nos. 2 and 5 are literal copies of instructions given, and approved by the appellate court, in *Baltimore, etc. R. Co. v. Wightman*, 29 Grat. 431. In reference to these instructions, the court in that case, at page 445, says: "We do not deem it necessary to enter into any discussion of the propositions of law involved in these instructions. It is sufficient

to say that they are fully sustained by the elementary writers, and by the opinions of the most respectable courts in this country. The decisions on this subject are given in Whart. Neg. §§ 627-661, inclusive; also section 422, and the notes to these sections; Redf. Bailm. § 346; Farish v. Reigle, 11 Grat. 697." It is, however, earnestly insisted by the counsel for the plaintiff in error that the concluding sentence of said instruction No. 2, to wit: "Any negligence or default in such cases makes such carriers liable in damages under the statute," is unquestionably wrong, because to justify a recovery two things must concur: First, negligence by the defendant; and, second, such negligence must have contributed to the injury sustained. It is certainly true that it is the conjunction of the negligence and the injury that creates the tort. Mere negligence does not become an actionable wrong, unless the other element is found in the same case, namely, an injury or damage suffered in consequence of the negligence or wrong. Cooley, Torts, 62; 2 Greenl. Ev. § 256. It is, therefore, apparent that this sentence, taken alone, does not propound a correct legal proposition; but, if considered in connection with the other instructions submitted with it, in one of which the jury were told that if they find from the evidence that the negligence of the defendant in no wise contributed to or occasioned the accident, then they must find for the defendant, I do not think it so objectionable as to warrant a reversal of the judgment. Instructions Nos. 6 and 7 are substantially the same as, and were evidently copied from, two instructions which were fully considered and approved by the court of appeals of New York in *Tilley v. Hudson River R. Co.*, 29 N. Y. 252. The New York statute under which that case was determined provided that "the jury may give such damages as they shall deem a fair and just compensation, not exceeding \$5,000, with reference to the pecuniary injuries resulting from such death to the wife or next of kin of such deceased person." Laws 1849, p. 388. It was therefore contended in that case that the recovery must be limited and confined to a pecuniary loss, flowing necessarily from the death. And in support of that view counsel cited many English and American cases, in which it was held that the damages must be assessed with reference to the pecuniary loss resulting from the death of the person injured, and that neither the physical pain of the deceased nor the mental sufferings of the surviving family can be taken into the estimate. See also *Shear. & R. Neg.* § 610; *Field, Dam.* § 630, and cases cited. The court, in a unanimous opinion, says: "The charge of the judge was explicit that the damages must be limited to pecuniary injuries; and he said that in estimating them they had a right to consider the loss (that is, the pecuniary loss) which the children had sustained in

reference to their mother's nurture and instruction, and moral, physical, and intellectual training. I think this does not imply that the children are necessarily and inevitably subjected to such loss, but leaves it to the jury to determine whether any such loss has been in fact sustained, and, if so, the amount of such loss. This is the fair scope and meaning of the charge, and, if it was not sufficiently explicit, should have been made so by a direct request for such purpose. This understood, I regard it as unexceptionable." *Tilley v. Hudson River R. Co.*, 29 N. Y., 285. And again, on page 288, the court says: "Nor do I think it was erroneous to instruct the jury that, while they must assess the damages with reference to the pecuniary injuries sustained by the next of kin in consequence of the death of Mrs. Tilley, they were not limited to the losses actually sustained at the precise period of her death, but might include also prospective losses, provided they were such as the jury believe from the evidence would actually result to the next of kin as the proximate damages arising from the wrongful death,"—citing *Tilley v. Hudson River R. Co.*, 24 N. Y. 473-477.

The foregoing views fully sustain the instructions here complained of, and I think they are consonant with reason and the purpose of the statute; and, if correct in that case, they are more truly so in the case at bar, because our statute does not, like the New York statute, limit the compensation "to the pecuniary injuries resulting," etc., but it provides: "In every such action the jury may give such damages as they shall deem fair and just, not exceeding ten thousand dollars." Section 6, c. 103, Code 1887, p. 709. It will thus be observed that our statute does not, in terms, limit the jury to giving compensation for pecuniary injuries, though such is, perhaps, its purpose and implied meaning; but still, as it is not express, the limitation ought not to be applied strictly. It is further contended that instruction No. 6 was improper because there was no evidence tending to support it. This is a mistake. There was evidence submitted to the jury that the decedent was 42 years old, made his living by days' work and laboring on his farm, had a wife and nine children, all of whom were living at the time of the trial; the oldest child was 19 years of age, and the youngest 16 months; that he was a church member, moral, religious, and industrious in his habits, a kind husband and parent, and had been sending his children to school. As was said by this court in *Dimmey v. Wheeling*, etc. R. Co., 27 W. Va. 32, 57, quoting from *Tilley v. Railroad Co.*, 29 N. Y. 286: "Within the statute, as to amount and the species of injuries sustained, the matter is to be submitted to the sound sense and justice of the jury. They must be satisfied that pecuniary injuries resulted. If so satisfied, they are at liberty to allow them from whatever source they actually proceeded which

could produce them. If they are satisfied, from the history of the family or the intrinsic probabilities of the case, that they were sustained by the loss of bodily care or intellectual culture or moral training which the mother had before supplied, they are at liberty to allow for it. The statute has set no bounds to the sources of these pecuniary injuries: If the rule is a dangerous one, and liable to abuse, the legislature, and not the courts, must supply the correction." If it was proper for the jury to consider these sources of injury, surely the defendant could not be prejudiced by having the jury instructed in respect to them. The instruction was therefore not improper. A new trial was not asked on the ground that the verdict was contrary to the evidence, but only upon the ground that the court misdirected the jury. Having determined that there was no error in the instructions to the jury, we must hold that the motion for a new trial was properly overruled. If we had been asked to set aside the verdict on the ground that it was not sustained by the evidence, we should have refused to do so, because the evidence, to say the least of it, does tend to support the verdict, and, this being a case involving negligence, which is a mixed question of law and fact, and one peculiarly within the province and control of the jury, we would not disturb the verdict, unless the facts distinctly showed that there was no negligence. *Washington v. Baltimore & O. R. Co.*, 17 W. Va. 190; *Johnson v. Baltimore & O. R. Co.*, 25 W. Va. 570.

Having found no error for which the judgment of the circuit court should be reversed, I am of opinion that said judgment should be affirmed.

ENGLISH and BRANNON, JJ., concurred. GREEN, J., absent.

Measure of Damages—Ejection from Train.—In an action to recover damages for wrongfully ejecting a passenger from a train, the measure of damages is such sum as shall compensate the plaintiff for all injury directly or naturally flowing from the act of the defendant in ejecting the plaintiff, including bodily and mental pain and suffering and any physical disability, or sickness, which may be the direct result of defendant's act. *Baltimore & Ohio R. R. Co. v. Bambray (Pa.)*, 16 Atl. Rep. 67.

Same—Natural Consequences of Injury—Burden of Proof.—In an action to recover damages for carrying plaintiff beyond her destination, it appeared that she was 70 years of age, and was only carried a few hundred yards beyond the station where she intended to alight. It was between 8 and 9 o'clock at night, the ground was wet, and it was raining slightly. At the time of the trial, plaintiff was shown to be suffering from a bronchial trouble which was serious and probably permanent. *Held*, that to enable plaintiff to recover for her sickness she was bound to show affirmatively that it resulted from the exposure, and that the burden of proof to establish that fact rested upon her throughout the trial, and never shifted upon the defendant. *St. Louis, Arkansas & Texas R. Co. v. Burns (Tex.)* 9 S. W. Rep. 467.

Same—Condition of Family.—In *San Antonio & Arkansas Pass. R. Co. v. Robinson (Tex.)*, 11 S. W. Rep. 327, it was held that testimony to the effect that the plaintiff had a wife and children was admissible in evidence, but in *Kreuziger v. Chicago & Northwestern R. Co. (Wis.)*, 40 N. W. Rep. 657, it was held that,

in an action for personal injuries, the plaintiff could not offer testimony of the fact that she had a child of tender years.

When only compensatory damages are recoverable for injuries sustained by the plaintiff, evidence as to the number and ages of the plaintiff's family is inadmissible. *Pennsylvania R. R. v. Roy*, 102 U. S. 451; *Pittsburgh, Ft. W. & C. R. Co. v. Powers*, 74 Ill. 341; *City of Chicago v. O'Brennan*, 65 Ill. 160; *Dreiss v. Friedrich*, 57 Tex. 70; but when the action is brought to recover damages for negligently killing the plaintiff's child, evidence as to the family and the condition of the plaintiff is admissible. *Johnson v. Chicago & Northwestern R. R.*, 64 Wis. 425.

In an action by a widow under the Missouri statute to recover damages for negligently causing the death of her husband, the plaintiff may offer testimony as to the number and ages of her infant children, the liability for their maintenance having been cast upon her by the death of the father. *Tetherow v. St. Joseph & T. M. R. Co. (Mo.)*, 11 S. W. Rep. 310.

STUTZ

v.

CHICAGO AND NORTHWESTERN R. CO.

(*Wisconsin Supreme Court, December 4, 1888.*)

Damages—Elements—Peril and Fright Attending Accident.—Where a passenger, being ordered to leave the train at a point at some distance from the station, is obliged to walk along the track, and in so doing falls into a culvert, receiving injuries and being frightened by the backing of trains on the track towards her, the jury are entitled, in awarding damages for the wrongful act of the defendant in putting her off the car at a dangerous place, to take into consideration not only the injuries sustained by the plaintiff, but also the peril and fright attending the accident.

Same—Effects of Accident.—In an action to recover damages for personal injuries, the plaintiff may show, by her evidence, that the injury sustained was of such a character as to render her unable to perform her work after the injury as she had been able to do before.

Same—Future Suffering.—In such an action, when there is evidence showing that the plaintiff had not at any time of the trial fully recovered from her injuries, she is entitled to recover for any future physical suffering which is reasonably certain to result from the injury complained of.

Action to recover damages for personal injuries. The defendant appeals from a judgment for the plaintiff.

Jenkins, Winkler & Smith for appellant.

J. E. Malone and *E. P. Smith* for respondent.

TAYLOR, J.—This is an action for personal injury to the plaintiff, alleged to have been caused by the negligence of the railway company. The material facts in the case are as follows: On the evening of the 4th of March, 1886, the respondent and a Mrs.

Kreuziger took passage in the caboose of a freight train, from Juneau to Minnesota Junction. The junction is north of Juneau.

Facts. When the train drew near to the junction, it stopped so that the caboose in which the plaintiff and her companion were riding stopped several hundred feet south of the depot platform. The night was dark, and the evidence tended to show, and the jury found, that the conductor of the train told the plaintiff and her companion that they must leave the car at that place; and, by leaving the car at that place, it was necessary for them to alight on the right-hand side of the car, and walk up, along a side track of the said road, several hundred feet, to reach the highway which they would take in going to their homes. This fact was well known to the conductor; and it was also well known to him that where the side track crossed said highway there was an open culvert across the track. Of this the plaintiff had no knowledge. The side track was raised above the surface of the ground, and was the only way for reaching the highway from the place where they left the car. The plaintiff had some bundles in her hands, and, when she got off the train, proceeded up the side track, and fell into the culvert, and injured her knee. While in the cattle guard, and struggling to extricate herself, the men in charge of the train switched some cars on the side track. She noticed the fact that cars were being placed on the side track, and became greatly excited and frightened by their approach. The cars, however, did not come nearer than 100 feet of the cattle guard, and the plaintiff extricated herself, and proceeded on her way home. For the injury resulting to her by being wrongfully directed to leave the car, and falling into the culvert, the plaintiff claims damages, alleging that the defendant company was negligent in directing her to leave the car at the place mentioned. Upon the trial in the county court, the jury found the material issues in favor of the plaintiff, and assessed her damages at \$1,000. Upon the facts of the case, as found by the jury, there is no contention on the part of the learned counsel for the appellant that the plaintiff was not entitled to a verdict for some amount of damages. The errors relied upon for a reversal of the judgment are exceptions taken to the admission of evidence, to the instructions of the court to the jury, and a refusal to give instruction requested by the appellant.

It is insisted that it was error to permit the plaintiff to give the following evidence: "How long were you in there?" (meaning the culvert.) "Oh, I could not tell,—I was so full of fright; at last, I helped myself out." "What were you frightened about?" Objected to; overruled; exception. *Answer.* "I was afraid the cars were switching back on me." "How did you go home?" *A.* "Full of fright." It is claimed by the learned counsel for the appellant that the plaintiff is not entitled to recover damages on

account of the fright which she experienced by reason of backing of the cars towards her upon the side track, and the refusal of the court to so charge was error. Upon the subject of damages, the trial judge instructed the jury as follows: "She is entitled to such amount of damages as, in your judgment, will compensate her for all the physical injuries directly resulting from the negligence complained of, as well as the mental suffering resulting therefrom.

**Elements of
damage—
Peril and
fright.**

This does not include punitive damages, but does include such pain and suffering of body and mind as you find, from the evidence, she has suffered from the negligence of the defendant, and without her fault, and which is directly the result of such negligence.

. . . If you find the plaintiff is entitled to recover, say, from all the evidence, how much will compensate her for all the injuries sustained,—the pain and suffering caused by the negligence complained of, if you so find; if you find it was the direct result thereof," etc. "The plaintiff, if she is entitled to recover, is entitled to full compensatory damages for all the direct physical injury, as well as the mental suffering, you may find, from the evidence, resulted from the injury caused by the negligence complained of." "By compensatory damages we mean such damages as, in your judgment, will be a reasonable compensation to the plaintiff for all the pains and suffering, in the past, resulting from the accident, and, also, any future suffering therefrom, which from the evidence, you may find it reasonably certain to result from said injury." These instructions were separately excepted to by the appellant. The appellant also requested the judge to instruct the jury as follows: "The plaintiff is not entitled to recover any damages on account of any fright which she experienced on account of the cars backing down towards her upon the side track." This instruction was refused, and the appellant excepted. It is argued by the learned counsel for the appellant that the authorities are quite uniform in holding that no action can be maintained for mere negligence on the part of the defendant, unaccompanied by insult, oppression, or indignity, which causes fright or other mental emotion only, and which does not result in injury to the person or the health of the plaintiff. And he therefore insists that it was error to allow the plaintiff to testify that she was frightened by the approach of the backing cars when she was in the culvert and struggling to extricate herself therefrom; and he also insists that the perils and dangers of the situation in which she was placed by the negligent act of the defendant, cannot be considered in awarding her damages. We agree with the general proposition of the learned counsel that for a mere negligent act only compensatory damages can be recovered, and that such compensatory damages ordinarily include only damages for such mental suffering as arises from the personal

injury received; and we may admit, for the purposes of this case, that, when the only ground of action against the defendant is fright caused by the negligence of the defendant, which is not followed by any injury to the person or the health of the plaintiff, and in no other way affects her rights of person or property, no action can be maintained. We are of the opinion, however, that in this case, and others of like character—where the cause of action is not grounded upon mere fright or terror, but upon the wrongful act of the defendant in putting her off the car in a place of danger, in the night-time,—in measuring the plaintiff's injury, it is not only competent, but it becomes essential, to determine the extent of plaintiff's injury, that all the surroundings of the wrongful act of the defendant are proper to be taken into consideration, in order to render a just verdict. Certainly, it cannot be urged, with any show of authority or reason, that the same damages should be awarded to a plaintiff who is wrongfully put off a car in a terrible storm, several miles from any place of shelter, as should be awarded to one who is wrongfully put off at a station in a town or city, where he can readily get shelter and protection; nor that the same damages should be awarded to the person who is wrongfully put off the cars in the middle of a high bridge, in the night-time, where trains are constantly passing, and the person who is so put off at a pleasant station at midday. In all cases of this kind, the actual surroundings which accompany the wrongful acts are, and should always be, considered in estimating damages.

This case does not present the question of the right to recover for mere mental suffering, independent of bodily or physical injury. Under the rule contended for by the learned counsel for the appellant, it would be equally improper to show that it was a dark night when she was directed to leave the car, and that she was compelled to walk along a raised side track, on which cars were being switched, and which she was compelled to traverse in order to reach the highway leading to her home, as to show that she was frightened, when struggling to escape from the culvert into which she had fallen, from fear of being run over by the approaching cars. Without stating that fact, the jury would have the right, in estimating her damages, to consider all the attendant dangers which surrounded and threatened her. It is not pretended but that the agent of the company had full knowledge of all the dangers which surrounded the plaintiff, when he directed her to leave the cars. The company cannot, therefore, say that these dangers were too remote, and that the terrorizing effect which they might have had was one which could not have been anticipated by it. As before said, the conductor, who directed the plaintiff to leave the car when and where she did, knew that cars would be backed upon the side track which he compelled her

to travel upon; he knew the night was dark, and might reasonably be held to have known that the backing of cars upon that track while the plaintiff was on it would be a cause of alarm to her, whether she had fallen into the cattle guard or not. The backing of the cars on the track was intimately connected with the wrongful act of the conductor; in a certain sense, it was a part of the *res gestæ*,—as much so as the darkness, the raised side track, and the open culvert, into which she fell. That the evidence was admissible, and proper to be considered by the jury, is, we think, supported by principle and authority. *Chicago & A. R. Co. v. Flagg*, 43 Ill. 364-367. In this case, the plaintiff was expelled from the car in the night-time, but, on the trial, gave evidence of no actual personal injury. On affirming the judgment, the court say: "It is also urged that, as the conductor acted in good faith, and without violence or insult, and there is no proof of actual damage to the plaintiff, the verdict should have been for only nominal damages. The verdict was for \$100. It was dark when this affair occurred; and the plaintiff was lame, and had two bundles, that seemed to be heavy. In order to reach the station, or village, he had to pass over a covered railway bridge, which spanned a stream, and which had to be crossed by means of a plank, or foot-path, about three feet wide, laid down upon the timbers. The only light came from below, and from the ends of the bridge. For a stranger, laden with bundles, to be compelled to walk through a dark railway bridge, on a narrow path, uncertain as to when a train may come, and liable to be crushed if one does come, is certainly not a desirable experience. The jury had a right to take these things into consideration," etc. In *Seger v. Barkhamsted*, 22 Conn. 290, which was an action against the town, to recover damages for maintaining a defective bridge, the trial judge instructed the jury that, if they found for the plaintiff, they had a right to consider all the circumstances of danger and peril attending the accident. To this instruction exception was taken; and, on appeal, the supreme court held the instruction right, and made the following remarks in regard to it: "That the plaintiff is entitled to be compensated for his personal injury there is, of course, no question; and that principle is sufficient to vindicate the charge on this point. Such actual injury is not confined to wounds and bruises upon his body, but extends to his mental suffering. His mind is no less a part of his person than his body; and the sufferings of the former are often times more acute, and also more lasting, than those of the latter. . . . The dismay, and consequent shock to the feelings, which is produced by the danger attending a personal injury, not only aggravate it, but are frequently so appalling as to suspend the reason, and disable a person from warding it off; and to say that it does not enter

into the character and extent of the actual injury, and form a part of it, would be 'an affront to common sense.'" See also *Woolery v. Louisville, N. A. & C. R. Co.*, 107 Ind. 381; 27 Am. & Eng. R. R. Cas. 210. *Meagher v. Driscoll*, 99 Mass. 281; *Canning v. Williamstown*, 1 Cush. 451. It must be remembered that, in this case, and in all others of a similar character, the ground upon which the defendant is held liable for any damages is the wrongful act of the agent of the company, in directing the plaintiff to leave the cars at the time and place designated, and not the fact that, after leaving the cars, the plaintiff fell into the cattle guard, and was injured. That fact was only an aggravation of her damages. She would have been entitled to recover, had she received no personal injury; and, in fixing the amount of the damages the plaintiff ought to recover, it seems but reasonable and just that all the circumstances of peril and danger which surrounded her at the time she was unlawfully directed to leave the cars must be considered; and that it was not error to direct the jury that, in assessing the damages, they might consider the fright which the plaintiff was subjected to by the unlawful act of the conductor. This case does not fall within the rule, if there be such a rule, that no recover can be had for merely putting a person in peril, when no personal injury results therefrom. The cases in which that rule has been laid down were all cases in which it was held that the defendant had not done any act which constituted a cause of action; and it does not apply to a case where the defendant has done that which constitutes a cause of action in favor of the plaintiff, and when the peril and fright are circumstances surrounding and attending the wrongful act of the defendant. We think the evidence objected to was properly admitted, and that there was no error in the instructions of the trial judge upon that question. The exceptions taken to the instructions given to the jury upon the question of damages were not insisted upon, on the argument, or assigned as error. The fourth and fifth errors alleged, relate to the cross-examination of the witness Askew, who was called for the defendant. While we think the court should not have permitted the witness to be questioned on his cross-examination as to any matter not enquired of the defendant on the direct, or, if permitted to do so, the court should not have allowed the plaintiff to contradict his answers, we are of the opinion that this examination, upon a collateral matter, was not so material to the real questions at issue as to justify this court in reversing the judgment for such error on the part of the trial judge. It is not apparent that such error could have had any influence with the jury, upon the issues of fact found by them on the trial. The sixth alleged error is clearly not an error. It was, clearly, competent for the plaintiff to show by her

**Effect of
accident.**

evidence that the injury to her person was of such a character as to render her unable to perform her work after the injury as she had able to do before. Although such evidence would be proper and competent in an action by her husband to recover for loss of service, it was also competent in this case, as tending to show the extent of her injuries. The jury were instructed that she could not recover in this action "for loss of time." It is also alleged that it was error to instruct the jury as follows: "She is entitled to recover for any further physical suffering which you may find, from the evidence, is reasonably certain to result from the injury complained of." It is said, **Future suffering.** there was no evidence upon which to found an instruction of this kind. We think the record shows that there was evidence tending to show that the plaintiff had not, at the time of the trial, fully recovered from her injuries. There was sufficient evidence upon which to base the instruction. The eighth error alleged as to the instruction given by the court becomes immaterial, as the jury found, in effect, that the conductor directed her to leave the cars at the place where she did leave them. It is urged that the verdict is excessive, and should have been set aside for that reason. The trial court having refused to interfere on that ground, this court will not set aside the verdict for that reason, unless it is clearly apparent from the evidence that the jury were actuated by passion or prejudice. We do not think the evidence discloses any such reason for reversing the judgment in the case.

The judgment of the county court is affirmed.

Elements of Damage—Peril and Fright.—Although the peril and fright to which the plaintiff has been subjected may be considered in assessing damages when he has, in addition, sustained physical injury, they, of themselves, constitute no ground for the recovery of damages. *Canning v. Williamstown*, 1 Cush. (Mass.) 451. But where the fright resulting from a collision, brought on the premature confinement of a female passenger, and the child was born dead, it was held that a good cause of action existed against the company. *Fitzpatrick v. Great Western R. Co.*, 12 U. C. Q. B. 645.

Anxiety for the safety of others constitutes no ground for the recovery of damages. *Keyes v. Minneapolis & St. L. R. Co.*, 36 Minn. 290.

Jumping from Train through Fright.—If a passenger leaps from a train through a fear for his safety which proves to be groundless, he has no claim to compensation for any injuries sustained thereby. *Chicago, R. I. & P. R. Co. v. Felton*, 33 Am. & Eng. R. R. Cas. 533; *Gulf C. & S. F. R. Co. v. Wallen*, 65 Tex. 568; s. c., 26 Am. & Eng. R. R. Cas. 219. But when the train has been derailed, and the passenger is alarmed by the peril occasioned thereby but acts as a person of ordinary prudence in like circumstances would act in endeavoring to escape, any injury to his health occasioned by the fright, or by striking the ground would be directly traceable to the derailment as its primary and proximate cause. *Smith v. St. Paul, M. & M. R. Co.*, 30 Minn. 169. See also *Twomley v. Central Park, N. & E. R. Co.*, 69 N. Y. 158; *Ingalls v. Bills*, 9 Met. (Mass.) 1; *Luno v. Tyngsboro*, 11 Cush. (Mass.) 563; *Stickney v. Town of Maidstone*, 30 Vt. 738; *Frink v. Potter*, 17 Ill. 406. And the damages resulting directly and proximately to plaintiff's person and health from the fright and from jumping to the ground would be general and not special. *Smith v. St. Paul, M. & M. R. Co.*, 30 Minn. 169.

37 A. & E. R. R. Cas.—13

MISSOURI PACIFIC R. CO.

v.

SHUFORD.

(Texas Supreme Court, November 3, 1888.)

Damages—Exemplary—Gross Negligence—Ordinary Care.—Where the court, in instructing the jury with reference to the plaintiff's right to recover exemplary damages, declares that what is meant by gross negligence is a total want of ordinary care, and ordinary care is that degree of care that a person would use under like circumstances, the charge is erroneous as it authorizes the jury to conclude that the railroad company is guilty of gross negligence, and therefore liable for exemplary damages, even though the company had exercised a degree of care but slightly less than persons generally would have exercised, and under the same circumstances.

Same—Natural Result of Negligence—Instruction.—If the court charge the jury that they are authorized to consider the question of exemplary damages, if the track of the railroad was out of repair and had been for a long time previous to the accident, and defendant knew of its condition and failed to remedy it, the charge is erroneous as authorizing the jury to award exemplary damages to the plaintiff whether his injuries were caused by reason of the defective condition of the road or not.

Same—Excessive—Permanent Spinal Injury.—When the evidence shows that the plaintiff in addition to receiving painful injuries which were only temporary in character, received a spinal injury which is likely to prove permanent, a verdict of \$4,000 will not be deemed so excessive as to require a reversal on appeal.

APPEAL from District Court, Smith County.

Action to recover damages for personal injuries sustained by a passenger upon one of the defendant company's trains. The defendant appeals from a verdict and judgment for the plaintiff.

J. R. Burnett for appellant.

H. Chilton for appellee.

STAYTON, C. J.—This is an action by appellee to recover damages for an injury alleged to have been inflicted upon him while a passenger on appellant's train. He alleged that the injury was caused by the failure of appellant to keep its road in good order, and sought to recover damages, actual and exemplary. The cause was tried by a jury, who returned a verdict in favor of appellee for \$4,000 as actual damages, and \$8,000 as exemplary damages, on which judgment was entered.

This and another, both being appearance cases, on proper application were placed on the jury docket. The other case, however, preceded this on the general docket, having been first filed, and both properly numbered in their order, but when placed

on the jury trial docket this case was placed first, the proper numbers of the cases, however, being preserved. When this case was called, appellant insisted that the other case should be first tried, but the court ruled that all the causes should be tried in the order in which they stood on the jury docket. The statute provides that "all suits in which final judgments shall not have been rendered by default, as hereinbefore provided, shall be called for trial in the order in which they stand on the docket to which they belong, unless otherwise ordered by the court." Rev. St. art. 1287. The statute contemplates that cases shall be docketed and numbered in the order in which the petitions are filed. *Id.* arts. 1181-1183. In making up the jury civil docket the same order should be observed as on the general docket, and the provisions of article 1287 should be complied with in the disposition of cases on that docket, unless for good cause shown the court should otherwise direct. *Id.* art. 3070. If through inadvertence the clerk shall not place cases on the jury docket in their proper order, then in calling cases for trial they should be called in their proper order as determined by number.

**Docketing
and trial of
case.**

In *Kirkland v. Sullivan*, 43 Tex. 233, it was held reversible error to call and force a party to try a cause out of its order, but the statute in force when that case was tried is unlike that now in force, in that it required all cases to be tried in their order, "unless otherwise ordered by the court, with the consent of the parties or their attorneys." The statute now in force recognizes the power of the court to require a cause to be tried out of its order without reference to the consent of parties. The exercise of this power may be revised by this court, but it is incumbent on the party seeking a revision of the action of the court in this respect to show that he was injured by the ruling. *Allyn v. Willis*, 65 Tex. 70. The bill of exceptions filed does not show that appellant suffered any injury by the ruling complained of, nor that it was not as well prepared to try the case as it would have been if it had not been tried until the one preceding it had been disposed of. This action was brought on January 21, 1888, and was called for trial on February 23d following. When called, an application for continuance was made, for the want of the testimony of two witnesses, resident in counties other than that in which the cause was pending. Service on defendant was had on the same day the suit was filed; interrogatories to take the depositions of these witnesses were not filed until February 15th; commissions to take their depositions were issued on the 22d, and these were sent to the general attorneys of appellant, at Houston, Tex., in order that they might have the depositions of the witnesses residing in Bowie and Anderson counties taken. This was not the exercise of that diligence required by the law.

There was no application to postpone the hearing of the cause until a later day of the term, nor does it appear that the evidence would have been obtained in time for the trial, had it not been tried out of its order.

It is conceded that facts existed which entitled appellee to recover actual damages, but the sufficiency of the evidence to authorize the allowance of exemplary damages is questioned, and their is ground for controversy upon that point. The accident occurred about two miles from Troupe, on appellant's road, between that place and Mineola. The distance between these places is 44 miles. The immediate cause of the accident through which appellee was injured, was shown to be a broken rail, but the evidence as to whether the break occurred at the time of the accident, or had existed for some time before, was conflicting. There was much evidence tending to show that appellant's road, at points other than that at which the accident occurred, had been in very bad condition for a long time prior to the accident, and on the trial the court gave the following charge: "(7) The plaintiff also prays for exemplary damages, and alleges that the accident was caused by the gross negligence of defendant in allowing its road to get out of repair, and allowing the same to remain for a long period of time before the accident, and that the company knew of such condition, and failed to remedy such defects. (8) What is meant by gross negligence is a total want of ordinary care, and ordinary care is that degree of care that a person would use under like circumstances. (9) So that, if you find that defendant's railroad was out of repair, and had been for a long period of time previous to the accident, and the defendant company knew of such condition, and failed to remedy it, or if the general bad condition of the road was so notorious that defendant, by the exercise of ordinary care, should have known of its bad condition, and failed to remedy it, then you would be authorized to consider the question of exemplary damages." The court had instructed the jury that "the evidence offered by plaintiff as to the general bad condition of the road cannot be considered in determining actual damages, but will apply, if at all, to the question of exemplary damages." The giving of the general charges above quoted is assigned as error. From the charges the jury must evidently have understood the court to inform them that they might award exemplary damages if appellant was guilty of gross negligence, as defined in the charge. While doubting the practical utility of attempting to define the different degrees of negligence recognized in the books, when the question is as to the liability, at all, of the person sought to be charged for an injury caused by his failure to use that care which his duty at the time and under

the circumstances required, yet, when it becomes necessary to define the degree of negligence requisite to authorize the recovery of other than actual damages, then such definition should be correctly given. In the charges complained of, was this done? The court did not attempt to define "gross negligence" otherwise than by declaring it to be a total want of ordinary care, and its definition of "ordinary care" was faulty. Ordinary care is said to be that degree of care which ordinarily prudent persons would use to prevent injury, under the circumstances of a given case. If the care used by appellant did not amount to ordinary care, then there was a total want of that degree of care. There can be no partial exercise of "ordinary care." It exists, as a degree, in completeness, or it is totally wanting in any given case. While, in a given case, "ordinary care" may not exist, yet there may exist at least slight care. Gross negligence, to be the ground for exemplary damages, would be that entire want of care which would raise the belief that the act or omission complained of was the result of a conscious indifference to the right or welfare of the person or persons to be affected by it. *Cotton Press v. Bradley*, 52 Tex. 600. The jury, under the charge, were authorized to conclude that appellant was guilty of gross negligence, and therefore liable for exemplary damages, even if they believed from the evidence that appellant had exercised a degree of care but slightly less than persons generally would have exercised, and under the same circumstances. A charge that tended to leave such an impression on a jury was erroneous. While the charge correctly informed the jury that the appellant alleged that his injury was caused by the gross negligence of appellant, when it came to inform them on account of what facts they could award exemplary damages it failed to inform that the act or omission from which the injury resulted must have been one that fixed gross negligence on appellant. It is too clear for doubt that no individual can become entitled to recover damages, actual or exemplary, from a railway company for any act or omission, however negligent or reprehensible, unless from it he receives injury. The legislature might give a *qui tam* action, or it might make the act or omission a crime, and punish it as such; but, unless from it injury results to the person complaining, he has no ground for a strictly civil action. The charges given authorized the jury to impose exemplary damages on appellant, if they believed from the evidence that the railroad was out of repair, and so had been for a long time, if this was known or might have been known to appellant, even though they may have believed that the road at the place where the injury occurred was only slightly defective; for the charge did not specify the extent to which the road must have been out of repair to authorize exem-

Same--
 Damages not
 recoverable
 unless injury
 is received.

plary damages. The charge, however, is subject to the broader objection that it authorized exemplary damages on account of the general bad condition of the road, without reference to whether appellee's injury resulted therefrom; and the charge, which informed the jury that the general bad condition of the road might be considered on the matter of exemplary damages, not placing any limit on its application, nor informing them for what particular purpose they might look to such evidence, tended in the same direction.

It is urged that the verdict for actual damages is excessive.

The evidence tends to show that appellee, in addition to hurts received that were painful, but only temporary in character, received a spinal injury from which it is likely he will never recover. We cannot hold the actual damages awarded excessive.

In view of what has been said, it is not necessary to discuss the other assignments of error. For the errors noticed the judgment will be reversed, and the cause remanded, unless appellee shall file a *remitter* of the sum adjudged to him as exemplary damages, in which event the judgment for actual damages will be affirmed.

Exemplary Damages—When Recoverable.—Where the plaintiff, in an action to recover damages for personal injuries, received the injuries complained of through the failure of the company to light a path leading from the station, in consequence of which she fell into an unguarded hole, the element of either wanton or wilful wrong, is not present and punitive damages cannot be recovered. *Green v. Pennsylvania R. Co.*, 36 Fed. Rep. 66. Where a passenger is prevented from leaving a train by a throng of passengers getting on it and the conductor refuses to let them off, but promises to send him back from the next station on the next train but fails to make the necessary arrangement, and the passenger is compelled to pay fare only compensatory, and not punitive, damages are recoverable. *Mississippi & Tennessee R. Co. v. Gill* (Miss.), 5 S. Rep. 293.

Same—Instruction.—Where the court instructs the jury, that they may consider the question of exemplary damages if the injuries complained of are caused by the gross negligence of the defendant company; that gross negligence is a total want of ordinary care, and ordinary care is that degree of care which an ordinary person would use under like circumstances, the instruction is erroneous as authorizing the jury to award exemplary damages, if the defendant exercised a degree of care but slightly less than ordinary care. *Missouri Pacific R. Co. v. Mitchell* (Tex.), 10 S. W. Rep. 411.

Same—Ejection of Passenger.—An action on the case by a passenger against a railway company for wrongfully expelling him from the train, with force and violence, though the declaration allege a contract for carriage, is not for breach of the contract, but for a tort by breach of duty, and punitive as well as actual damages are recoverable if the circumstances of the particular case warrant such recovery. *Head v. Georgia Pacific R. Co.* (Ga.), 7 S. E. Rep. 217.

Same—Instruction.—It is error for the court to instruct the jury that exemplary damages "are given as a kind of punishment," and to leave it to infer that they might be awarded if the defendant knew of the general bad condition of the railroad prior to the accident, and permitted it to remain so, without reference to the question whether the injury of which the plaintiff complains resulted from that known general bad condition. *Missouri Pacific R. Co. v. Brazil* (Tex.), 10 S. W. Rep. 402.

Same—Measure of Damages.—It is not error to give an instruction concerning

punitive damages to the effect that if the jury should find for the plaintiff, they might award damages "in their discretion not exceeding in all \$5,000." *Louisville & Nashville R. Co. v. Ballard* (Ky.), 10 S. W. Rep. 429.

Excessive Damages.—Where it appeared that the plaintiff was not strong before the accident, and the accident, besides otherwise injuring him, deprived him permanently of the use of his right arm for purposes of manual labor, and plaintiff had testified that in the four months previous to the accident he had made \$600 from his fruit farm with the assistance of his son, but that these four months were the most profitable during the year, it was held that a verdict for \$9,000 was excessive, and that the verdict should be reversed except the plaintiff enter a remittitur of \$3,000. *Florida R. & Nav. Co. v. Webster* (Fla.), 5 S. Rep. 714.

Where the plaintiff was 62 years old, had three of his ribs broken, his side bruised and was rendered insensible for a time by the concussion, and the evidence as to the probability of his ultimate complete recovery was conflicting, one physician declaring that it was not improbable that paralysis might ensue, it was held that a verdict of \$3,750 was not so clearly excessive as to require a reversal of the judgment. *Missouri Pacific R. Co. v. Aikin* (Tex.), 9 S. W. Rep. 437.

In an action to recover damages for the wrongful expulsion of the plaintiff, the jury returned a verdict for \$500. The testimony of the plaintiff was to the effect that the train was moving about ten miles an hour; that the conductor took him by the right shoulder, gave him a shove which threw him off the train, and that he struck the ground with his shoulders. He also testified that he was not seriously injured, had no bones broken and no sprains, but was considerably bruised. *Held*, that the verdict was not excessive. *East Line & Red River R. Co. v. Lee* (Tex.), 9 S. W. Rep. 604.

A verdict for \$500 in favor of a woman 55 years old, who previously to the accident had earned \$8 or \$10 per month, and who was so injured through the defendant's negligence that she was confined to her bed and room for months and suffered great pain, and at the time of the trial still suffered pain from the injury, is not excessive. *Atlanta & W. T. R. Co. v. Smith* (Ga.), 8 S. Rep. 446.

The plaintiff, a woman, while a passenger on defendant's train, was carried past her destination, a flag station, no whistle having been blown. Plaintiff asked to be put off at her destination, but the conductor refused, offering to take her on to the next station. Plaintiff then got off the train, the conductor not assisting her in any way, and his voice and manner being rude and insulting. She walked back about a mile, to the station to which she had purchased her ticket, carrying a bundle and valise. Her route lay through an uninhabited country; and as a result of the walk and the excitement, she was sick for several days. *Held*, on a second trial, that a verdict of \$3,005 against the railroad company, for injuries sustained by the plaintiff, would not be disturbed. *Louisville & N. R. Co. v. Ballard* (Ky.), 10 S. W. Rep. 429.

Where it appeared that plaintiff's wife had been bruised and otherwise injured, that a miscarriage was threatened, and that at the time of the trial, three months after the accident, she was unable to appear as a witness, that up to that time she had not been able to attend to her household duties, and that the shock had brought on nervous prostration which was likely to continue as long as she lived, it was held that a verdict for \$5,000 was not excessive. *Missouri Pacific R. Co. v. Mitchell* (Tex.), 10 S. W. Rep. 411.

BUFFALO EAST SIDE R. CO.

21.

BUFFALO STREET R. CO.

(*New York Court of Appeals, November 27, 1888.*)

Street Railway—Interchange of Traffic—Contract—A contract entered into by a railroad company that "so long as it receives for the transportation of passengers the fare allowed by law on May 3, 1872, and no longer," it will make connections with roads belonging to another company. "and that it will not make any change in such rates without the consent" of the other company, terminates by force of its own limitation whenever a statute reducing the fares chargeable by the contracting company is enacted.

Same—Constitutional Law—Police Power—Impairing Obligation of Contract.—The New York statute (Laws 1875, c. 600), reducing the rate of fare for carrying passengers on street railways in the city of Buffalo, is a valid exercise of the police power of the State, and is not rendered unconstitutional by the fact that a contract existed between two companies for the interchange of traffic at the rates of fare which existed previous to its enactment.

APPEAL from General Term of the Supreme Court, Fifth Department.

Action by the Buffalo East Side R. Co. against the Buffalo Street R. Co. to recover liquidated damages for breach of contract. The plaintiff appeals from a judgment for the defendant.

James C. Carter and E. C. Sprague for appellant.

Sherman S. Rogers for respondent.

RUGER, C. J.—The plaintiff and defendant are respectively incorporated street railroad companies, located in the city of Buffalo, and the action was brought upon a contract to recover a sum stipulated to be paid, as liquidated damages, upon a breach thereof by either party that should reduce its rates of fare below the prices authorized to be charged under the statutes in force on May 3, 1872; each party thereby agreeing to make no change therein without the consent of the other. Subsequent to this contract, the legislature, by chapter 600 of the Laws of 1875, enacted, in substance, that it should be unlawful for any street railroad company in Buffalo to charge more than five cents for each passenger carried on their respective roads without regard to the distance travelled. This price was considerably less than the amount authorized to be charged by the former statute. Immediately thereafter the defendant reduced its rates of fare to the price authorized by the act of 1875, and this reduction constitutes the breach of the contract relied upon for a recovery.

No question is made but that if the act of 1875 was a valid

enactment, the defendant was required to conform to it, and would have a good defence to the action. It is, however, claimed by the plaintiff that the act was unconstitutional and void, inasmuch as it impaired the obligation of contracts. The only contract claimed to have been impaired is the one sued upon. Among the defences made to the action is the claim that the agreement had terminated, before the alleged breach, by virtue of its own limitation; and it is also urged that a reasonable construction of the language of the agreement shows that its obligations were not intended to survive any statutory reduction of the rates of fare chargeable upon such railroads. There is no express provision in the contract providing for the period of its duration, but there are several which furnish strong grounds for the inference that the parties did not intend that it should continue after an unfavorable change in the rates of fare. Among these provisions, it is only necessary to refer to one providing that "the said party of the first part, so long as it receives for the transportation of passengers the fare allowed by law on the 3d day of May, 1872, and no longer," will make connections with roads to be built by the party of the second part, and run a sufficient number of cars to accommodate all passengers applying for transportation, etc.; and another contained in the fifth paragraph, which provides that the party of the first part agrees that it will, during the continuance of the contract, charge the same rates for the transportation of passengers over its railroads, or any part thereof, that it is "permitted to charge by the statutes in force regulating the same on the 3d day of May, 1872, and that it will not make any change in such rates without the consent of the party of the second part." Similar provisions were contained in the contract relating to the obligations of the party of the second part, and contemplating the termination of the contract upon the same contingency.

It is quite clear that the parties had in view a condition of affairs under which they would not be permitted to charge and receive the rates of fare authorized by former acts, and in that event expressly provided for the termination of the contract. But the plaintiff contends that the rates authorized on May 3, 1872, still continue, so far as these two companies are concerned, by force of the obligations of their contract, and that the State was precluded by the constitutional inhibition from passing any law impairing its effect. We are not impressed with the soundness of this contention. It was competent for the parties to agree upon any period as the duration of their contract, and they might, if they chose to do so, provide that it should cease upon the passage of even an unconstitutional law. It is difficult to explain what is meant by the expressions that the contract should con-

When contract terminates.

tinue so long as the companies receive and were permitted to charge the rates authorized on May 3, 1872, and no longer, if there was no constitutional power to effect such change. Settled rules of construction require us to give some meaning and effect to all of the language employed in the contract, provided it can be done without doing violence to the plain object and intent of the parties in making their agreement. It is quite clear that the parties assumed the existence of the power of the legislature to change the rates, and contracted with reference to such a contingency. A fair and reasonable construction of the contract would seem to be that the parties intended a change effected by the voluntary action of the parties alone, and not one made in obedience to paramount authority. It would be unreasonable to say that either party intended to run the hazard and danger of disobedience to a statute of the State, and there is nothing, we think, in the contract which required it to do so. Every exercise of legislative power is presumed to be constitutional, and it cannot, without the clearest language indicating such an intention, be supposed that parties anticipated the enactment of an unconstitutional law, or contracted upon such an assumption. We are therefore of the opinion that the contract, so far as this provision was concerned, had terminated by force of its own limitation when the act of 1875 was enacted. Construed in this way, the legislation of 1873, incidentally referring to this contract, and providing that its validity should not be affected thereby, is intelligible, and perhaps sustainable, but upon any other theory it is difficult to see its object or design. We cannot ascribe to the legislature an intention by that act to hamper and restrain its successors in the exercise of legitimate constitutional power over the subject of railroad fares (*Railroad Commission Cases*, 116 U. S. 307); and if it was an effort to pass upon the validity of the contract, that subject was a judicial one, and beyond the province of legislative authority to act upon.

But we are further of the opinion that the act of 1875 was a valid exercise of legislative power, and did not impair the obligations of any contract within the meaning of the constitutional provision. The inability of one legislature to limit or control the legislative action of its successors is a familiar principle which needs no citation to support it. *Presbyterian Church v. City of New York*, 5 Cow. 538. The same authority which confers upon one body the power of legislation authorizes its successors, in the exercise of their duty, to change, alter and annul existing laws when, in their judgment, the public interest requires it. In the performance of their duty of legislating for the public welfare, each successive body must, from necessity, be left untrammelled, except by the restraints of the fundamental law; and when called

Act of 1875
unconstitutional.

upon to act upon subjects which concern the health, morals or interests of the people, as affected by a public use of property for which compensation is exacted by its owners, they are unlimited by any constitutional restraint. It is unnecessary to discuss this proposition with much fulness, as it was conceded by the appellant upon the argument, and is repeated in its printed brief, that the authority of the legislature, in the exercise of its police powers, could not be limited or restricted by the provisions of contracts between individuals or corporations. *Pacta privata publico juri derogas non possunt*. This proposition is also abundantly established by authority. *Presbyterian Church v. City of New York*, *supra*; *Coates v. Mayor*, 7 Cow. 585; *Vanderbilt v. Adams*, Id. 349; *Mayor etc. v. Second Avenue R. Co.*, 32 N. Y. 261; 26 Am. & Eng. R. R. Cas. 546; *People v. Boston & A. R. Co.*, 70 N. Y. 569; *Stone v. Trust Co.*, 116 U. S. 307; *Barbier v. Connolly*, 113 U. S. 27.

It was said in *People v. Boston & A. R. Co.*, *supra*, that "railroad corporations hold their property and exercise their functions for the public benefit, and they are therefore subject to legislative control. The legislature which has created them may regulate the mode in which they shall transact their business, the price which they shall charge for the transportation of freight and passengers, etc. . . . It may make all such regulations as are appropriate to protect the lives of persons carried upon railroads, or passing upon highways crossed by railroads. All this is within the domain of legislative power, although the power to alter and amend the charters of such corporations has not been reserved. . . . Such legislation violates no contract, takes away no property, and interferes with no vested right."

In *Munn v. Illinois*, 94 U. S. 124, Chief Justice WAITE, in speaking of the implied powers which social organization confers upon its government over the conduct and property of members, says that "it does authorize the establishment of laws requiring each citizen to so conduct himself, and so use his own property, as not necessarily to injure another. This is the very essence of government, and has found expression in the maxim, *sic utere tuo ut alienum non lædas*. From this source came the police powers, which, as was said by Mr. Chief Justice TANEY in the *Licence Cases*, 5 How. 583, 'are nothing more or less than the powers of government inherent in every sovereignty; . . . that is to say, . . . the power to govern men and things.' Under these powers the government regulates the conduct of its citizens one towards another, and the manner in which each shall use his own property, when such regulation becomes necessary for the public good. In their exercise it has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen,

bakers, millers, wharfingers, innkeepers, etc., and in so doing to fix a maximum of charge to be made for services rendered, accommodations furnished, and articles sold."

Judge BRADLEY, in the *Sinking Fund Cases*, 99 U. S. 747, referring to the *Munn Case*, says: "The enquiry there was as to the extent of the police power in cases where the public interest is affected; and we held that when an employment or business becomes a matter of such public interest and importance as to create a common charge or burden upon the citizen—in other words, when it becomes a practical monopoly, to which the citizen is compelled to resort, and by means of which a tribute can be exacted from the community—it is subject to regulation by the legislative power." We think it unnecessary to discuss the question as to how far the legislature were authorized to go in regulating the affairs of corporations under the power of amendment and repeal imposed by the Revised and other statutes. § 8, *tit.* 3, c. 18, pt. 1, p. 1531 (7th ed.)

It seems to be conceded by all of the authorities that such reservations confer upon them power to regulate, to a certain extent, the general management and control of the internal affairs of such corporations, but the grounds already referred to are sufficient to dispose of the case without considering questions not essential to that end. We think the authorities cited are decisive of the question, and lead to an affirmance of the judgment.

The judgment of the court below is therefore affirmed. All concur, EARL and GRAY, JJ., in result.

BRIGGS

vs.

UNION STREET R. CO.

(*Massachusetts Supreme Judicial Court, November 28, 1888.*)

Street Railway—Entering Moving Car—Province of Jury.—Whether a person riding upon the front or rear platform of a horse car, or getting on or off at either platform while the car is in motion is in the exercise of due care, is a question of fact for the jury.

Same—Contributory Negligence.—Where the plaintiff testified that he was 68 years old and weighed over 190 pounds, that he signalled to the driver and the car slowed up, that while it was going about four miles an hour he attempted to enter it at the rear platform when his foot slipped, that the car had started off and was going at increased speed, and that he made two other attempts to get on, and failing, was thrown down and injured, it is for the jury to say whether the plaintiff was guilty of contributory negligence.

Same—Signal to Driver.—The court cannot say as matter of law that an at-

tempt to enter a horse car which is moving at about the rate of four miles an hour is negligence, even if no signal is known to have been given to the driver.

Same—Self-protection.—Whether the conduct of a passenger in seizing the rail of the rear dasher and trying to pull himself up to the car after he had lost his hold upon the rail attached to the body of the car was such conduct as to preclude the recovery of damages, is a question for the jury.

ON exceptions from Superior Court, Bristol County.

Action of tort by Geo. A. Briggs against the Union Street R. Co., to recover damages for personal injuries sustained by the plaintiff.

The jury returned a verdict for the plaintiff, and the defendant excepted.

E. L. Barney for plaintiff.

Crapo, Clifford & Crapo for defendant.

KNOWLTON J.—The first question in this case is whether there was any evidence that at the time of the accident the plaintiff was in the exercise of due care. The plaintiff's conduct in its relation to the accident, was particularly described in his testimony, and in the absence of any disclosure which, according to general recognized standards of judgment, plainly showed it to have been negligent, it was for the jury, and not for the judge, to say whether it was reasonably careful. Whether a person riding upon the front or rear end of a horse car, or getting on or off at either platform while the car is in motion, is in the exercise of due care, has repeatedly been decided to be a question of fact for a jury. *Meesel v. Lynn & B. R. Co.*, 8 Allen (Mass.) 234; *Murphy v. Union R. Co.*, 118 Mass. 228; *McDonough v. Metropolitan R. Co.*, 137 Mass. 210; 21 Am. & Eng. R. R. Cas. 354.

Plaintiff's
contributory
negligence—
Province of
jury.

In this case the plaintiff testified that he was 68 years old, and weighed 190 to 200 pounds; that he signalled to the driver that he wanted to get on, and that the car "slowed up;" that while "it was going about as fast as some horses will walk—in the neighborhood of four miles an hour," he got hold of the forward rail of the rear platform with his right hand, and of the rear rail on the dasher with his left hand, and made a spring to get on, when his foot struck on the edge of the step and slipped off; that the car had started up, and was going at increased speed; that he made two other attempts to get on, then let go of the forward rail with his right hand, and held to the dasher-rail with both hands, trying to keep up with the car until he was thrown down and injured. We cannot hold, as a matter of law, that the plaintiff was negligent in trying to get upon the car as he did. It was for the jury to test his conduct by their knowledge and experience, and by their judgment of what men of common prudence would be expected to do under like circumstances.

The court was also requested to instruct the jury that if the

plaintiff believed the driver had not seen his signal, his attempt to board the car was negligence. We are of opinion that this instruction was rightly refused. The court cannot say, as a matter of law, that an attempt to step upon a horse car which has just "slowed up," and is moving no faster than this is said to have been, is negligence, even if no signal is known to have been given to the driver. Both questions raised by these requests are covered by the decision in *McDonough v. Metropolitan R. Co.*, *ubi supra*, a case which was fully considered, and the facts of which were very similar to those of the case at bar.

The only remaining exception relates to the conduct of the plaintiff in seizing the rail of the rear dasher, and trying to pull himself up to the car, after having lost his hold upon the rail attached to the body of the car. But this was apparently a sudden, and perhaps almost involuntary, effort of the plaintiff to protect himself, after his foot had slipped off the step, and he was in immediate danger of falling. He testified that it all happened very quickly, and that the car stopped within 15 or 20 feet from the place where he first grasped the rail. One should not be held too strictly for an attempt to avert a suddenly impending danger, even though his effort is ill judged. This part of the plaintiff's conduct was rightly submitted to the jury.

Exceptions overruled.

Street Railway—Contributory Negligence in Riding on Foot Board—Province of Jury.—It is for the jury to say whether a passenger is guilty of contributory negligence in riding upon the foot board of a summer car on a street railroad, in consequence of which he is injured by being struck by a car moving in an opposite direction upon the other track, when such a passenger has already met such cars without injury. Although he saw the car which struck him approaching, he is not necessarily chargeable with knowledge that any conditions existed which required him to use greater precaution for his personal safety in meeting such car than he had successfully used when meeting the others. Hence, it is a question for the jury as to how far he had notice of such conditions. *Geitz v. Milwaukee City R. Co.* (Wis.), 39 N. W. Rep. 866.

Boarding Moving Street Car—Contributory Negligence.—See *Stager v. Ridge Ave. Pass. R. Co.*, 33 Am. & Eng. R. R. Cas. 540; *Harman v. Washington, etc., R. Co.*, 30 Ib. 627, note 632, and cases cited.

DOUGHERTY

v.

MISSOURI PACIFIC R. CO.

(*Missouri Supreme Court, March 18, 1889.*)

Street Railway—Passenger—Duty of Company.—In an action by a passenger to recover damages for injuries sustained by being thrown down by the sudden starting of a street car, an instruction that the burden of proof rests upon the

defendant to show that the injury was caused by something not under its control and not from the use of unsuitable or skittish horses, or careless or unskillful management of the car, and that by the exercise of the utmost human foresight, skill and care, such injury could not have been prevented, states too broadly the degree of care incumbent upon the defendant.

Same—Contributory Negligence—Instruction.—In such an action, an instruction that the plaintiff may recover although guilty of negligence if such negligence did not contribute to or cause the injury, or if the defendant's servant were negligent in the management of the car and if the injury would not have happened, notwithstanding the plaintiff's negligence, had there been no negligence on the part of the defendant, is open to the objection that it allows the plaintiff to recover regardless of his own negligence contributing to his injury.

ON REHEARING.—For the opinion on the original hearing see 34 Am. & Eng. R. Cas. 488. The instructions Nos. 3 and 10 referred to in the opinion, will be found in Vol. 34, pp. 491, 493.

Dyer, Lee & Ellis for appellant.

Boyle, Adams & McKcighan and *Wm. B. Thompson* for respondent.

RAY, C. J.—This case, on rehearing (see 34 Am. & Eng. R. R. Co. 488), has been thoroughly rediscussed by counsel, and their respective briefs carefully reconsidered by the court.

The result reached by a majority of the court is that **Degree of** they have not been able to concur in so much of the **care required** opinion heretofore filed as approves of instructions **of company.**

Nos. 10 and 3, given in said cause. On the contrary, they are of opinion, and so hold, that said instructions (especially No. 10) are misleading and erroneous, and for that reason the judgment should be reversed, and the cause remanded, and it is accordingly so ordered. It is true that instruction No. 3 seems to have been often approved by this court, and courts elsewhere, but as often the courts have felt and recognized the propriety, if not necessity, of explaining and construing the same. No. 3 seems to state the abstract proposition somewhat too broadly as to the degree of care incumbent on the defendant. No. 10 is also obnoxious to the criticism of being somewhat inconsistent with itself, if not practically **Contributory** abolishing the doctrine of contributory negligence **negligence.** altogether; or, in other words, allows the plaintiff to recover, regardless of his own negligence contributing to his injury. See authorities cited in appellant's briefs. In these views Judges SHERWOOD, BLACK, and BRACE concur. BARCLAY, J., not sitting.

For myself, I adhere to the views heretofore expressed in the original opinion, in reference to instructions Nos. 3 and 10. Whatever view I might entertain if the doctrine of No. 3 was now up for the first time, I apprehend it has been too often approved and too long acquiesced in to be departed from in the present case.

BATE

v.

CANADIAN PACIFIC RAILWAY.

(15 Ont. App. 388.)

Passenger—Baggage—Condition Limiting Liability.—The plaintiff, with her father and brother, went, some hours before the departure of the train on which she was a passenger, to a ticket office of the defendants in O., in order to procure a ticket to W. and return. The only kind of return ticket issued, on the route, by the defendants, was called a land seeker's ticket, for which thirty dollars less than the fare each way separately was charged. These tickets were not transferable, and were subject to a number of conditions printed on them, among which was one limiting the baggage liability to wearing apparel not exceeding one hundred dollars in value; and another condition required the signature of the passenger to the ticket for the purpose of identification and to prevent its transfer. The plaintiff's brother purchased the ticket for her, and at his request the time for using it was extended beyond the time limited by the ticket. The defendants' agent then asked for and obtained plaintiff's signature to the ticket, by which she agreed, in consideration of the reduced rate, to all its provisions, explaining to her that it was for the purpose of identification. The plaintiff did not read the ticket, having sore eyes at the time, and the agent did not read or explain the conditions to her further than by mentioning that she alone could use it. On the trip to W. an accident happened to the roadbed of the defendants' railway by reason of which the train was overturned, and the plaintiff's baggage, valued at over \$1,000, caught fire, and was destroyed. There were no indications before the accident of any defect in the roadbed. In an action for damages for such loss, *held*, that there was no evidence of any negligence with which the defendants were chargeable; and that, whether or not the plaintiff signed the ticket or informed herself of its contents, it embodied the terms and conditions on which alone the defendants contracted to carry her and her baggage.

APPEAL from the judgment of the Common Pleas Division reported 14 O. R. 625.

McCarthy, Q. C. for appellant.

Robinson, Q. C., and *G. H. Watson* for respondents.

The facts and the authorities cited are fully stated in the court below, and in the present judgments.

PATTERSON, J. A.—I think the judgment of the divisional court is right.

I do not know that I am led to that conclusion by precisely the same train of reasoning that influenced the learned judges who concurred in the decision, and I shall therefore make an independent statement of my views.

The main question is, the extent of obligation involved in the contract of the defendants.

The plaintiff's luggage, for the loss of which she brings the ac-

tion, was delivered by her to the defendants, as passenger's luggage, to be carried with her on the journey from Ottawa to Winnipeg, and was regularly received, checked, and placed in the baggage car. Under the general rule, the company would be liable, as common carriers, for the full value of the luggage, whether the fire which consumed the car and its contents was attributable to their negligence, or to some cause for which they were not open to blame. For authority for this proposition it is only necessary to cite the comparatively late cases of *Talley v. Great Northwestern R. Co.*, L. R., 6 C. P. 44; *Cohen v. Southeastern R. Co.*, 2 Exch. D. 253, and *Bergheim v. Great Eastern R. Co.*, 3 C. P. D. 221. The reasoning of the last mentioned case respecting the liability for luggage which the passenger takes with him into the carriage has been recently spoken of with some disapproval in *Great Western R. Co. v. Bunch*, 13 App. Cas. 31, 34 Am. and Eng. R. R. Cas. 224, but no fault is found with the dicta affirming the unqualified liability as common carriers for luggage taken full charge of by the company. The case of *Great Western R. Co. v. Bunch*, may be added to the list of authorities for that unqualified liability, which seems now firmly settled, although opinions to the contrary were held to as late a date as 1864. See *Stewart v. London & Northwestern R. Co.*, 3 H. & C. 135.

**Liability
for loss of
luggage
under gen-
eral rule.**

But the defendants contend that while they undertook to carry the plaintiff's luggage, they did so only upon the terms that their liability was limited to wearing apparel not exceeding \$100 in value.

**Limitation
of liability—
Statutory
provisions.**

I do not propose to discuss the statutory provisions which were in question in *Vogel v. Grand Trunk R. Co.*, 10 A. R. 162; 11 S. C. R. 112, and which are now found in R. S. C., c. 109, sect. 104. I have not formed any opinion adverse to the application of the section to the case of a passenger travelling on a return ticket who loses his baggage or suffers personal injury by reason of the roadbed of the railway being allowed, by the negligence of the company, to be in an unsafe condition.

I think they are inapplicable here, because there was, in my opinion, no evidence of any negligence with which the defendant company was chargeable.

The jury have not found the defendants guilty of negligence in regard to the roadway. They find that the accident was caused by the improper construction of the roadbed; but it was not constructed by the defendants. It is part of the road which, by the sixth clause of the agreement between the Government and the defendant company, set out in the schedule to the statute 44 Vict. c. 1 (D), was to be completed by the Government of

equally good quality in every respect with the standard prescribed by the agreement for the portion contracted for by the company, and which, when completed, was to be conveyed to the company; after which, by the seventh clause, the company was for ever efficiently to maintain, work and run the Canadian Pacific Railway. Under this agreement and statute it undoubtedly became the duty of the defendants efficiently to maintain the part of the railway the subsidence or sliding of which caused the accident; but does the fact found by the jury, that the accident was caused by the improper construction of the roadbed, involve a charge of negligence against the defendants for using the road in the state in which it was conveyed to them as a completed road by the Government?

There is evidence that this part of the road had been run for one season by the contractors before it was taken off their hands by the Government in or about May, 1883, and it was run continuously up to the occurrence of the accident on the third of October, 1886, a train passing over it in safety a few minutes before the accident, nothing occurring in all that time to create suspicion of the bank being insecure, and no repairs but ordinary track repairs being required. If the defendants were negligent in using the road in the state in which they received it, when did their negligence begin? If the accident had happened the day after they received the road, on what ground could it be said to have been caused by their negligence?

I see none, nor do I see on what evidence it could be properly held that they had any duty with respect to the road which they failed to discharge. The attack and defence on this branch of the case seems to have been confined at the trial to the original construction of the road. The jury were not asked to say in what particular they found the defendants to have failed in their duty, and it would be difficult to point to evidence on which a charge of such failure could have been reasonably supported.

The chief witness for the plaintiff was Mr. Shaw, a civil engineer, who happened to be a passenger on the ill-fated train. He described the embankment as being constructed of sharp sand on a slanting rock, and attributed the shifting of the structure to that mode of construction. His opportunities of observing what he described would seem from reading the evidence scarcely to have warranted the confidence with which he gave his account, which materially differed from that of an engineer and one or two other persons who had been engaged in the work of construction, and who proved, if their evidence is true, that Shaw was very far astray both as to the material used and the bottom on which it rested. Mr. Shaw's theory may be

**Defendant
not negli-
gent as to
roadway.**

**Same—
Evidence of
Mr. Shaw,
a civil
engineer.**

gathered from the following extract from the report of his evidence.

"Mr. O'Gara—Q. Was that the proper way to make an embankment over a ledge of rock of that kind? A. Not to my judgment as an engineer.

Q. You have been employed, I believe, in the construction of railways? A. Yes, a good many years.

Q. What should be done in order to make that a safe and proper embankment? A. There should have been a retaining wall, in a case like that, at the foot, to keep it from sliding into the muskeg, and it should have been of different material.

Q. What is the character of that coarse sand? A. Well, it has no cohesion, it is not fit for railway work.

Q. Does not stick together and form a compact body? A. No.

Q. And is liable to come away at any time? A. Yes, the shock of a passing train would cause it to fall: keeps slipping. I fancy the cause of this accident was from water getting at the toe of the embankment, which it melts; the sand and water from the muskeg might have turned into a kind of quicksand.

R. Eats it away? A. Yes; eats it away."

Now whatever may have been the value of Mr. Shaw's evidence, or of his opinion as an expert, he does not speak of anything which should have called the attention of the defendants to what he considers the defective construction of the road, or to the sapping process to which he attributes the giving way of the bank; while on the other side there is direct evidence that there were no indications of the kind.

There are two cases which may be noted as useful authorities in dealing with this branch of the case. *Redhead v. Midland R. Co.*, L. R. 2 Q. B. 412, and in the Exchequer Chamber 4 Q. B. 379, which finally decided that in carrying passengers the company are not insurers like common carriers of goods, but are bound only to use care and diligence, and *Richardson v. Great Eastern R. Co.*, 1 C. P. D. 342, where the judgment reported in L. R. 10 C. P. 486, was reversed.

Same—
Authorities
examined.

Those cases related to defects in vehicles used by the carriers, but they were decided on principles equally applicable to defects in the permanent works of a railway.

A good deal of the reasoning of Sir Montague Smith, who delivered the judgment of the Exchequer Chamber in *Redhead's Case*, is founded on cases relating to structures, such as *Brazier v. Polytechnic Institution*, 1 F. & F. 507; *Pike v. Polytechnic Institution*, 1 F. & F. 712; *Ford v. London and South Western R. Co.*, 2 F. & F. 730, 732; and *Grote v. Chester and Holyhead R. Co.*, 2 Exch. 251.

In *Richardson's case* a collision had been caused by the break-

ing of the axle of a coal truck which did not belong to the defendant company, but had come on to their road from another line. The axle broke in consequence of a crack which might have been discovered by scraping off the dirt and minutely examining the axle. The jury found that it was not the duty of the company to have made a minute examination of that kind, but said it was their duty to have required from the owner of the truck some distinct assurance that it had been thoroughly examined and repaired. A defect which had no connection with that in the axle had been observed and repaired. Referring to it and to the jury's answer about the assurance that ought to have been obtained, JESSEL, M. R., said, p. 345:

"If the defect discovered were such as ought reasonably to induce a person of experience to think that some other defect existed or was likely to exist, then there would be a duty to examine further, but if the defect discovered had no probable connection with any other undiscovered defect, then I see no reason why any further or other examination should be made. Now I read the answer of the jury to the third question as meaning that there was no such duty as suggested by the question, but that the defendant ought to have enquired. But there was no evidence on which they were entitled to find that such a duty existed or that it had been neglected. It is not for the jury to lay down an absolute duty such as this, irrespective of the case and the evidence laid before them. It is impossible to make that answer a foundation for a verdict against the defendants."

The judgments of MELLISH, L. J., and of POLLOCK, B., put the same view with much force.

In the case before us there was no defect discovered, but from the time when the defendants received the road from the government and became bound by the agreement which the statute affirmed to maintain and work it, and for some time before that, it had appeared to be safe and sound.

Two other questions which were answered by the jury were these:—

<p>Absence of appliances for saving baggage.</p>	<p>"Q. Could the baggage have been saved by proper efforts of the company's officers and servants, if they had proper appliances? Yes.</p> <p>Q. Was the train supplied with proper appliances for saving baggage in such an emergency or not?</p>
---	--

No."

These answers may be conceded to be absolutely true without touching the issue of negligence.

When we think of what the emergency was as described by the witnesses: the baggage car turned on end and in flames; the baggage man hemmed in by trunks; many others in danger and unable to extricate themselves; one at least of the train hands

receiving injuries which proved fatal; the night dark, except as illuminated by the burning cars; and the efforts of every one directed to the saving of life; we cannot take the finding that with proper appliances for saving baggage in such an emergency the baggage could be saved to be more than a vague truism, not involving the assertion of any duty incumbent upon the company or possible of performance. The concluding remarks of Sir George Jessel which I have just been quoting are opposite to these answers.

The company being therefore at liberty to limit the liability attaching at common law to common carriers, let us see if that was done.

The findings of the jury respecting the contract are confined to a few particulars, and are contained in the answers to three questions.

**Contract
Limiting
Liability.**

"Q. Did the plaintiff sign the printed form produced to her by the ticket agent at Ottawa when she asked for a return ticket to Winnipeg and back? A. Yes.

Q. Upon what representation and for what purpose did she sign that printed form? A. For the purpose of identification.

Q. Did she read it before signing or was it read to her, or was her attention called to its special provisions, further than that the ticket was not transferable, and therefore required her signature for the purpose of identification? No."

These questions are intelligible only in connection with other facts which it was not thought necessary by the council by whom the questions seem to have been settled, or by the Judge, to have formally found. Some of those other facts are proved by the witnesses, and with respect to others we may say, as Lord Halsbury said of similar facts in *Great Western R. W. Co. v. Bunch*, *supra*, that both sides assumed them to be proved, and it would be mere pedantry to suggest that they were not formally proved.

There is no conflict of testimony among the witnesses who speak of the transaction out of which the contract arose. They are the plaintiff, her father, her brother, and Mr. Parker the company's ticket agent at Ottawa. The plaintiff desired to go from Ottawa to Winnipeg and after spending some time at Winnipeg to return to Ottawa. The ordinary fare from Ottawa to Winnipeg was \$40, and from Winnipeg to Ottawa \$45 or \$46, the trip thus costing \$85 or \$86 when the fare each way was paid separately. But the company was accustomed to issue return tickets, called land seekers' tickets, at a considerable reduction on the ordinary rates. This was the only kind of return ticket issued on this route by the company. It was in the following words:—

**Transaction
out of which
contract
arose.**

Issued by Canadian Pacific Railway. Good for one first-class

passage to———station, stamped or written in margin of attached coupon and return, only on presentation of this ticket when stamped by company's agent and presented with coupons attached subject to the following contract:—

1st. It is not good for passage if any alterations or erasures whatever are made thereon.

2nd. If the coupons are marked second-class or emigrant, the passenger is entitled to such passage only.

3rd. If this contract and its coupons bear no "L" punch cancellations or stamp other than the ordinary dating stamp, the passenger is entitled to all the privileges accorded to holders of unlimited tickets of like class.

4th. If this contract and its coupons are cancelled with an "L" punch, it indicates that the ticket was sold at a reduced rate, and must be used on or before the expiration of date as cancelled on the margin thereof, and that no stop over will be allowed hereon. If not so used, or if more than one date is cancelled, it is void.

5th. This ticket is not transferable; it must be signed by the passenger in ink, and if presented by any other than the original purchaser whose signature is hereon, the conductor will take it up and collect full fare, the purchaser will write his or her signature when requested to do so by the conductors or agents.

6th. The return part of the ticket will not be honored for passage, unless the holder identifies himself or herself, as the original purchaser to the satisfaction of the ticket agent of the Canadian Pacific Railway at station stamped or written in margin of the ticket, and unless officially signed and dated in ink and duly stamped on back hereof by authorized agent.

7th. Baggage liability limited to wearing apparel not exceeding \$100 in value.

8th. The coupons belonging to this ticket will not be received for passage if detached.

W. C. VAN HORN,
Vice-President.

In consideration of the reduced rate at which this ticket is sold, I hereby agree to all the provisions of the above contract.

KATIE BATE, (signature.)

J. E. PARKER, (witness.)

Issued by Canadian Pacific Railway."

It was printed on a long strip of paper about three inches wide, with four coupons following it, besides having another coupon at the top called "Agent's Stub" and marked "Not good for passage," the whole paper being more than a foot in length.

The price charged for one of these tickets for passage from Ottawa to Winnipeg, and return within forty days, was \$55, a reduction of \$30 from the ordinary full fare.

The plaintiff's father enquired about the terms as to rates

charged and time allowed, but took no part in the actual purchase of the ticket. That was done by the plaintiff herself and her brother, or rather by the brother for the plaintiff, at Mr. Parker's office, about ten in the forenoon of the 20th of September, 1886, the train leaving about midnight.

The office is not at the station, but is an office in another part of the city.

The plaintiff wished to remain longer than forty days, and her brother asked Mr. Parker if he could extend the time to about Christmas. After some conversation, Mr. Parker agreed to do so, and altered the ticket accordingly. When he had completed the filling out of the ticket, all which was done in the presence of the plaintiff and her brother, he placed the ticket on the counter for her to sign; she asked why she was required to sign it, and Mr. Parker explained to her that the ticket was not transferable, and that her signature was required for the purpose of indentification. She thereupon signed the document, her brother standing beside her speaking to some one, and she took the ticket home with her. I believe we are not told who folded up the paper, but the plaintiff says that she could not read it because her eyes were sore.

These are the undisputed facts in evidence. The findings of the jury are inferences proper to be drawn from the evidence, and we have to say if, upon those facts and findings, the liability of the company can properly be held to extend beyond the amount of \$100 mentioned in the seventh condition.

Prima facie the plaintiff is bound by her signature to the contract, and the effort on her part is of course to get rid of the *prima facie* effect of her act. We are expected to take as proved a very important fact which is not embraced in the findings of the jury, namely, that neither the plaintiff, her father nor her brother knew what the conditions were, or that there were any conditions on the paper she signed.

Ignorance of parties as to conditions in ticket.

I cannot make that assumption as a result of the evidence, if I am to reason about it at all. I think the younger Mr. Bate rebuts it. It might be unjust to him, and it certainly would be uncomplimentary, to suppose that he was so unintelligent, or that he took so little interest in the business he was doing for his sister or father, paying the sister's fare with the father's money, as not to have been aware that the document he saw was not an ordinary ticket. But he knew of at least one special term, viz., that concerning the time, which he procured Mr. Parker to alter, and he heard Mr. Parker speak of another which made the ticket not transferable.

But in the view I take of the legal position no importance attaches to the plaintiff's signature. It was only necessary for the purpose of indentification, and Mr. Parker was quite right when

he told the plaintiff that that was what it was for. He, in fact, merely told her what is set out in the fifth condition. When he explained that the ticket was not transferable, he did two things:

Ticket embodied terms of contract.	fying the holder of the ticket, and he referred to a restriction which would be understood, as we may suppose, by the plaintiff, or at all events by her brother, to be something stated in the document. There is
---	--

no support in the evidence or in the findings of the jury for the suggestion that he concealed the fact that there were for herself. The most that can be said has been said by the jury; other conditions, or in any way led her to forbear examining them that is, that the plaintiff did not read the paper before signing it, and that Mr. Parker did not read it to her or call her attention to the special conditions, further than by mentioning the fact that she alone could use the ticket as the reason why her signature was required. If he had not asked her to sign, but had simply handed her the ticket, there is no reason to suppose that she would have read it or got any one to read it for her; yet, whether she did or did not inform herself of the contents of the paper, it must be taken in my judgment to embody the terms on which alone the company contracted with her. There was no contract outside of these terms. The company never offered to carry her and her luggage at the reduced rate except on these terms.

It will not be necessary to refer to many decisions in support of this position.

Stewart v. London and North Western Railway Company, 3 H. & C. 135, was very like this case. A condition in the time bills which were referred to by the tickets issued for an excursion train, was "Luggage under 60 lbs. free at passengers' own risk." The plaintiff's luggage was lost by the negligence of the company, and the company was held to be protected by the condition. One point decided was that the condition was not governed by the Railway and Canal Traffic Act, 17 & 18 Vict. c. 31, § 7. The correctness of that holding has been questioned, and perhaps overruled, in *Cohen v. South Eastern Railway Company*; but apart from that difference of opinion, which does not touch the circumstances of our case, the principles on which the contract was dealt with may be taken as applicable to it. POLLOCK, C. B., said: "As to the finding of the jury, that the plaintiff was not aware of the contents of the time bills, the rule applies that a person must be presumed to know what he has the means of knowing, whether he avails himself of those means or not. The bills show the terms on which the railway company run these special trains," etc., and BRAMWELL, B., "First," he says, "I did not know what was on the ticket," thus claiming the benefit of

his own carelessness in not reading it. It is enough that he has had the opportunity," etc. PIGOTT, B., remarked: "This was a special contract, and it was competent for the parties to make it."

A number of cases from 1862 onwards, not, however, including *Stewart v. London and North Western R. W. Co.*, are examined by STEPHEN J., in *Watkins v. Rymill*, 10 Q. B. D. 178.

"Thrown into a general form," he says, at p. 188, "the result of the authorities considered appears to be as follows: A great number of contracts are, in the present state of society, made by the delivery by one of the contracting parties to the other of a document in a common form, stating the terms by which the person delivering it will enter into the proposed contract; such a form constitutes the offer of the party who tenders it. If the form is accepted without objection by the person to whom it is tendered, this person is, as a general rule, bound by its contents, and his act amounts to an acceptance of the offer made to him, whether he reads the document or otherwise informs himself of its contents or not. To this general rule, however, there are a variety of exceptions. 1. In the first place, the nature of the transaction may be such that the person accepting the document may suppose, not unreasonably, that the document contains no terms at all, but is a mere acknowledgment of an agreement not intended to be varied by special terms."

I need not quote further, but merely refer to the report. From what I have already said, it will appear that the present case cannot, in my judgment, be brought within any of the exceptions. I think it comes within the general rule, and that the application of that rule to it is illustrated by the latest of the cases reviewed by Mr. Justice STEPHEN, viz., *Burke v. South Eastern R. W. Co.*, 5 C. P. D. 1, decided in 1879. I shall read what he says of it.

"In this case the plaintiff took a ticket from London to Paris from the defendants. On the outside of the cover was, 'Cheap return ticket, London to Paris and back, second class,' and other matter, but no reference to the inside of the cover. On the inside was a condition limiting the responsibility of the defendants to their own trains. The plaintiff was injured while travelling in France. He sued the defendants and said he had not read the condition, and did not know it. COCKBURN, C. J., asked the jury the question suggested in *Parker v. South Eastern Railway Company* [that is, whether the company did what was reasonably sufficient to give the plaintiff notice of the condition], and they answered in favor of the plaintiff. The defendants moved to have judgment entered for them, and this was done, the Divisional Court holding that the book was the contract, and that the condition was an indivisible part of it. The judgment in this

case can hardly be supported by any principle short of that laid down in *Zunz v. South Eastern Railway Company*, if indeed it does not go further."

This reference is to the language of COCKBURN, C. J., in *L. R.*, 4 Q. B., at p. 644, where he laid down the law as follows:—

"However harsh it may appear in practice to hold a man liable by the terms and conditions which may be inserted in some small print on his ticket, which he only gets at the last moment, after he has paid his money, and when, nine times out of ten, he is hustled out of the place at which he stands to get the ticket by the next comer, still we are bound by the authorities to hold that when a man takes a ticket with conditions on it, he must be presumed to know the contents of it, and to be bound by them."

There is no such reason to call the rule, when applied in this case, a harsh rule. The plaintiff had, by herself and her friends, the most ample opportunities to inform herself of the conditions connected with the reduction of fares on these land-seekers' tickets. The condition touching the \$100 worth of wearing apparel would be sufficiently liberal for the class indicated by the designation of the ticket, even if it limited the quantity of luggage to be carried to \$100 worth. That is not the limitation, which extends only to the liability of the company in case of loss, and it is open to every one, as it was to the plaintiff, to render the company liable without that limitation by paying full fare instead of accepting the return ticket at a greatly reduced rate.

In my opinion we should dismiss the appeal with costs.

HAGARTY, C. J. O.—I agree fully with the judgment just delivered.

I only add a few words to emphasize the clear distinction which is in my mind between the case of a passenger applying for carriage by a railway company at ordinary rates common to the travelling public, and of one desiring to travel on reduced rates and terms, and obtaining certain advantages not obtainable except by special agreement.

The courts properly regard with jealous scrutiny any attempt to grant exemptions from liability on ordinary travellers at rates common to all. The common carrier has to accept the traveller at the common rate, and he must give reasonably clear evidence of the agreement by the passenger to any special contract for exemption. This is very clearly put in the leading case in the Lords in *Henderson v. Stevenson*, *L. R.*, 2 Sc. Ap. 470.

But the plaintiff here stands in a distinct position; a special bargain is made as to journey and return, and as to the time to be allowed therefor, and the reduced rate of carriage. That bar

gain is evidenced by the document handed to the plaintiff, and whether signed by her or not is, in my judgment, the contract of carriage. It is read or not read as the bearer may think fit.

I am wholly unable to accede to the appellant's argument that the plaintiff could in any way be misled or thrown off her guard by the clerk asking for her signature and telling her it was for the purpose of identification. This was perfectly true, and how this is to be interpreted to mean that the conditions of the contract have no other bearing or meaning, I am unable to understand.

I think the plaintiff is not entitled to recover beyond the amount already paid.

OSLER, J. A., concurred.

BURTON, J. A.—There is no dispute as to the amount of the loss in this case, which the jury has assessed at \$1,077.50, less \$100 paid into court, and which the defendants contend is sufficient under the terms of the special contract which they set up to cover the loss, even if there is any legal liability, which they dispute. The divisional court set aside that verdict and entered judgment for the defendants, the court being divided in opinion. Mr. Justice ROSE, on the ground that there was evidence of negligence, and that the findings of the jury on that point could not be interfered with. The Chief Justice and Mr. Justice GALT, that the negligence was not that kind of negligence which was contemplated by the sections of the Railway Act relied upon in the *Vogel Case*, and holding that the plaintiffs had no right of action beyond the claim of \$100, which, if the contract was established, might, in the absence of negligence, perhaps well be, but apparently overlooking the fact that the evidence and the findings of the jury negatived any such contract; or holding, perhaps, that by travelling on the ticket the contract was conclusively established.

Extent of
defendant's
liability.

I do not propose to discuss the question of negligence which has been so fully gone into by some of the judges below, and by one of my learned brothers in this court, because in my view of the case it is not material. The defendants are liable to the full amount found by the jury as common carriers, unless they have proved that they were exempt wholly or partially by some agreement made and entered into between the plaintiff and themselves. That the defendants never offered to carry the plaintiff and her luggage upon any other terms is, with great respect, quite beside the question. The delivery of the ticket with any condition by itself amounts only to a proposal to carry upon certain terms, and until brought to the notice of the party intended to be

Same—
Agreement
for exemp-
tion.

bound is not a contract; whereas in the present case the defendants held themselves out as carriers of passengers. As remarked somewhere, *a vinculum juris* with one end loose is on principle an inadmissible conception.

To constitute a contract there must be an agreement, which may be ascertained "either by the concurrence of the parties in a spoken or written form of words as expressing their common intention," or by a proposal being made by one of them and accepted by the other.

In a case recently before us there was not only evidence of the terms on which the company proposed to carry, but that the plaintiff knew that he was being carried at a reduced rate in consideration of his submitting to certain conditions or restrictions. That of course constituted the contract; if the plaintiff having notice that there were some conditions omitted to inform himself of their precise character, that would not affect the actual contract. Conduct may of course be relied on as constituting the acceptance of a contract, but is in every case a question of fact for a jury, not as it appears to have been treated in some of the earlier cases, a matter of law, and it (no less than the words relied on for the same purpose) must be unambiguous and unconditional.

I think the late cases seem to establish this proposition, that actual knowledge may be inferred as a fact from reasonable means of knowledge, but it is a question for the jury under all the circumstances of the particular case. If, in the present case, it had been shown that it was distinctly pointed out to the plaintiff that the company had two rates of fare, under one of which they assumed the ordinary risks of carriers of passengers and their luggage, and under the other or reduced rate they claimed by special contract to relieve themselves of part of their common law liability, I can see no reason why such a contract would not be perfectly legal and binding. But it appears to me that the onus was upon the company to establish not only that there was a difference in the fare charged on ordinary and return tickets, but that a person accepting a return ticket assumed certain risks and relieved the company to that extent.

It is a matter of common knowledge, and one of which courts of law must (unless, in deed, the rights of litigants are to be adjudicated upon on mere theories and not on what we all know to be the ordinary usages of life in matters of the kind), take notice that railway companies do, for the purpose of securing traffic for their lines, issue return tickets at reduced rates without exacting or imposing any condition or restriction of their liability by reason of such reductions, although they do some-

**Contract—
How con-
stituted.**

**Onus on
company
to show
that plain-
tiff as-
sumed risk.**

**Plaintiff's
ignorance
of condi-
tion—
Purpose of
signature.**

times in such cases require the signature of the party to prevent the ticket being transferred. There were certain facts in this case which were undisputed, and certain other facts which it was quite unnecessary to leave to the jury. For instance, that the plaintiff did not in point of fact know of the condition or have her attention drawn to it by the company or its officials, and the further fact that the plaintiff signed the printed form, though found specially by the jury, were facts upon which the evidence was uncontradicted. But the other questions were important. Upon what representation and for what purpose did she sign the printed form? The answer is strictly in conformity with the evidence. For the purpose of identification. She is then asked: Did she read it before signing, or was it read to her, or was her attention called to its special provisions further than that the ticket was not transferable, and therefore required her signature for the purpose of identification, and the answer is in the negative. Apart from the answers of the jury, it is quite clear from the evidence that the only information given to the plaintiff, her father or her brother, was that the ticket was only good for forty days, and the agent consented to extend that period. In other respects it was the usual form of such tickets with coupons, which the parties would have no means of reading until issued and paid for.

Granting that the denial of the plaintiff is not necessarily conclusive, what is there in the circumstances of this case to cast a doubt upon her evidence or to lead necessarily to the inference that she either knew or ought to have known that the ticket contained conditions? A much stronger case would have been made against the plaintiff, if the only facts had been that she had applied for a ticket without anything being said beyond the fact that return tickets were issued at a reduced rate; it might have been urged with much greater force that the notice on the face of the ticket was sufficient information to her, but even then it would have been a question for the jury, and we could not have interfered with their finding and hold as a matter of law that the verdict should be entered the other way, or even send the case down again for trial. But the circumstances of this case are much stronger in favor of the plaintiff. In the first place there is the express denial of the plaintiff; there is the fact that although asked to sign the ticket, she was told that it was for the purpose of identification, and that she would have to do so also at Winnipeg, so as to prevent a transfer of the ticket to anyone else, which though true in fact was only half the truth, as it purported to be an actual agreement on her part to agree to all the provisions of the above contract; a circumstance strongly calculated to put her off her guard, even if there had been no obstacle to her informing herself by reading the ticket; but there is the additional fact

that she had a weakness of the eyes which prevented her reading it.

As to the suggested difficulty about calling attention specially to the terms, it would have been no more trouble for the station agent to inform the plaintiff that the signature was required for a two-fold object, to prevent the ticket from being transferred, and to bind her to the conditions, than to make the one statement only, which, though true, was misleading. No doubt, as has been pointed out in a number of the cases to which we were referred, where the contract is made by the delivery by one of the contracting parties to the other of a document in a common form, stating the terms by which the person delivering it will enter into the proposed contract, that constitutes an offer; if it is accepted without objection by the other, he is as a general rule bound by its contents, and his act amounts to an acceptance whether he reads the document or not, and a *fortiori* where he signs it; but these are subject to exceptions.

<p>Nature of transaction— Terms of document accepted.</p>	<p>One of these is, that the nature of the transaction may be such that the person accepting the document may suppose, not unreasonably, that it contains no terms at all, but is a mere acknowledgment of the money paid and a voucher to satisfy other parties, as the railway officials in the present case, that the holder is entitled to travel upon it for the period mentioned in it.</p>
---	---

As put by Lord Justice MELLISH, in *Parker v. The Southeastern R. W. Co.*, if a person driving through a turnpike gate receives a ticket upon paying the toll, he might reasonably assume that the object of the ticket was that by producing it he might be free from paying toll at some other turnpike gate and might put it in his pocket unread; and then he distinguishes such a case from that of a person shipping goods on a sea voyage and receiving a bill of lading, who would be bound by the terms of it, though he never read it, the reason being that in the great majority of cases persons shipping goods do know that the bill of lading does contain the terms of the contract of carriage.

<p>Cases where persons become bailees for reward.</p>	<p>There is also an obvious distinction between those cases where there is a common law liability, as in cases where persons become bailees for reward of articles deposited with them for safe custody, as in the cloak room cases, and such cases as <i>Watkins v. Rymill</i>. In the former, in the absence of any special contract the party receiving the property is responsible to the depositors for the full value if unable to restore it on demand.</p>
--	--

The question in such cases is whether the ordinary contracts of bailment, which would have resulted from the receipt by the company or person of the property and the payment by the plaintiff of the prescribed charges, have been modified by agreement.

In such cases the depositor is entitled *prima facie* to regard the ticket as a mere receipt, and a voucher to enable him to reclaim his property, and is in no way put upon enquiry whether the deposittee has any further or ulterior object. If the depositor was aware that there were conditions *cadit questio*. I think he would also be equally bound if he was aware, or had good reason to believe, that there were statements upon the ticket intended to affect the relative rights of himself and the other party, and did not take the pains to read them and ascertain precisely what they were. But the onus of bringing this knowledge home would be upon the defendant (*Gabell v. Southeastern Railway Co.*, 36 L. T. N. S. 154). In the absence of any such knowledge or information or good reason for belief, there would be no obligation to examine the ticket with the view of ascertaining whether there were any conditions upon it. Whether he had such knowledge, information or reason for belief is a question of fact to be determined by the jury on the evidence.

On the other hand, as in such cases as *Watkins v. Rymill*, there is no common law liability; and none being ascertained by the common law, the terms must necessarily depend on the agreement of the parties. That was the case of the deposit of an article for sale on commission. From the very nature of the case, the special terms must be gleaned from the receipt and conditions contained in it, and this, therefore, constituted the contract between the parties, and any question as to whether the plaintiff read the conditions or not would be beside the question.

Whatever difference of opinion may have existed, the result of the authorities appears to be that except in such cases as I have just referred to, where the finding of the jury would be regarded as perverse if they found against the knowledge of the party accepting the document, it must always be a question of fact for the jury, whether the company had taken reasonable means to make known the conditions; and whatever value may be attached to any remarks of such a distinguished man as Chief Justice Cockburn, I must call attention to the fact that the language used by him, and which has been cited from his judgment in *Zunz v. The Southeastern R. W. Co.*, was a mere *obiter dictum*, not essential in any way to the decision; there was no contention in that case that the plaintiff did not know of the condition, the sole question was whether it came within the Railway and Canal Traffic Act, in which case it was required to be in writing. But whether that was or not the opinion of the learned judge at that time, it is quite clear that it was not so ten years later, when in summing up to the jury in the case of *Burke v. Southeastern R. W. Co.* (41 L. T. N. S. 554), he said:

Watkins
v.
Rymill.

Question for
jury—
Remarks of
Justice
Cockburn.

"The defendants have a perfect right to make that condition with the passenger, and to stipulate that they shall not be responsible for the negligence of the other company, but they must take care that they bring that condition home to the knowledge of the passenger, or at all events that they do what in the opinion of the jury is reasonably sufficient to give him that knowledge."

That would have been a perfectly good charge in a case like the present, but was totally inapplicable to that which the learned Judge was trying. The loss occurred upon a French railway, and the plaintiff could not recover without producing the ticket; when produced it disclosed the condition relieving the defendants from responsibility, and it was the duty of the learned judge to nonsuit or direct a verdict for the defendants.

I thought on the first reading of the case that it was opposed to the view which I have been endeavoring to present, and also to the conclusions I have come to as to rule 321, but on further consideration it appears to me to be a very strong authority for both my positions. In the first place there was no common law liability as common carriers; from the very nature of the contract there could not be, it was a contract not over the company's own line alone, but over other lines in France.

The plaintiff could not, as in this case, launch his case by proving that he was being carried by the defendants and paid his fare, and being obliged to rely on the contract he could not accept it in part and reject it in part; he proved the contract on which he was being carried, and that being produced showed that the defendants were not liable. It comes therefore within the principle of the case of *Watkins v. Rymill*, there being no liability and no contract beyond the ticket itself. It not being a case therefore in which the defendants would be liable as common carriers unless they succeeded in cutting down their common law liability by establishing a contract, but one on which the plaintiffs in order to succeed had to prove the contract, the learned judge was wrong in leaving the question he did to the jury, but should have directed a nonsuit, and the divisional court upon that state of facts could, under the rule, do what the learned judge at the trial ought to have done.

The signing of the ticket so far from carrying the case any further in favor of the defendants, in my opinion militates against them. It cannot of course be relied on as a contract because it is essential in every contract that there be volition; as pointed out in *Foster v. MacKinnon*, a man cannot be said to contract when he signs a paper upon representation and under a belief that it is different from what it turns out to be; to make a valid and binding contract the mind must go with the act.

To hold that this court can now disregard the findings of the

**Effect of
signing of
ticket.**

jury, and enter a judgment for the defendants under rule 321, would, in my opinion, be in effect not merely to deprive the plaintiff of her right to have her case disposed of by a jury, but wholly to disregard their finding upon facts, which were peculiarly for them, and as to which it is impossible to say that as to them only one answer could properly be given. I cannot believe that the legislature ever intended to vest any such power in the court, whose action should be confined strictly to those cases in which not only no additional facts remain to be proved, but in which upon the facts proved no jury would be justified in finding a verdict for the plaintiff.

**Power of
court to dis-
regard find-
ings of jury.**

See remarks of Lord Justice THESIGER in *Yorkshire Banking Co. v. Beatson*, 5 C. P. D. 127.

That that is also the general view is borne out by remarks of Mr. Justice STEPHEN in *Watkins v. Rymill* to which I have just referred. He says: "Suppose that the case were sent for a new trial, and that the jury on the undisputed facts were to find that the defendant had not taken reasonable means to give notice of the conditions to the plaintiff, would it not be our duty to set that verdict aside as being a verdict which upon the evidence no intelligent men could justly return? We think it would, and that being so, it seems to follow that the question is one of law and not of fact. It is, in one sense, a question of fact, but it is a question of fact to which, by law, one answer only can be given, and this is the same thing as a question of law." But we must bear in mind that he was there dealing with a case in which there could be no liability apart from the contract created by the receipt.

In a case like the present, where a party is entitled to be carried on payment of the fare demanded, the onus is entirely shifted; she is told for a single fare we charge so much, for a return so much, nothing being said about the conditions except that the ticket is only good for forty days, and they bargain about nothing else. The company assumes, as I have shown, in such a case the responsibility of cutting down their common law liability by agreement, and that is for the jury. If they fail in satisfying a jury of that contract they fail altogether. The defendants have not established that the condition was brought to the knowledge of the plaintiff, and no authority can be found for the court in such a case assuming the functions of the jury and entering a judgment; on the contrary, it is only in cases where the judge at the trial for want of evidence could have granted a nonsuit or directed a verdict for one side or the other that the court can exercise a similar power. That this is the proper construction to be placed on rule 321 is also borne out by the judgment in

**Same—
Functions
of jury.**

Milissich v. Lloyds. MELLISH, L. J., there says (36 L. T. N. S. 423):

"I think this report may be fair or it may be unfair, but then is it a question of fact or law whether the report is fair or unfair? I think that it is a question of fact, and should be left to a jury to determine. Then the argument is, that the evidence is all one way, and that it is useless sending the case down for a new trial, because no jury could reasonably find the other way. In my opinion the court must be very cautious not to take upon itself the functions of a jury. Notwithstanding the great powers given by the Judicature Acts it is still, of course, the province of the jury to determine between the credibility of witnesses on either side. Here, however, the question is more than what is the inference to be drawn from the facts proved in evidence."

BRET, J. A., in the same case says:

"It is a recognized rule that where there is some evidence, judges will not interfere with the verdict, but where there is no evidence they will. If the matter is so conclusive that no reasonable man could find otherwise than in one way, then the court, as a matter of law, should direct the jury to find in that way, but the moment a reasonable man might say that the jury might have found in favor of the plaintiff, then the question is for the jury. In this case I may have a strong opinion to which side the balance of the evidence inclines, but I cannot say that a reasonable man might not think otherwise."

In *Stewart v. Rounds* a county court case (7 A. R. 517), decided by the common pleas division sitting for this court, it was held that there was no evidence to support the defence, and therefore that the court could do as the judge at the trial might have done, namely, direct a verdict for the plaintiff, but I fully agree in the remarks of Sir Adam Wilson in that case, the power is one to be most sparingly and cautiously exercised, and will not be exercised where there is evidence to go to the jury.

The remarks of BOWEN, L. J., in *Toulmin v. Millar*, 12 App. Cas. 746, are to the same effect, and confine the right to interfere to cases in which the court is satisfied that no jury could properly come to a different conclusion. It should be borne also in mind that the English rule, of which our rule 321 is a copy, has been amended, and the additional power given to the court to "draw all inferences of fact" not inconsistent with the findings of the jury.

It appears to me, therefore, to be clear that the most the defendants could be entitled to would be to a new trial, and this could only be on the ground of misdirection on the part of the learned judge, in omitting to ask the jury whether the company did what was reasonably sufficient to give the plaintiff notice of the con-

dition. The divisional court might have sent the case back for a new trial to have that question disposed of, but not having done so I do not think we are called upon in this court even to give that measure of relief, the more so as I think it would be impossible to say that a jury would not be fully justified in answering such a question in the negative; and I will go further, and say, that if I was disposing of this case as a juror, I should hold that under the circumstances the company had not done what was reasonably sufficient.

**Defendants
only entitled
to new trial.**

It is a very hard case upon the defendants, and the legislature might well interfere so as to confine the recovery in such cases to a specified sum, unless upon payment of an increased rate of fare to cover the additional risk.

The question is important not only as to the amount involved, but in reference to the proper construction of rule 321.

For these reasons I think that the appeal should be allowed, and the verdict of the jury and the judgment thereon restored.

Appeal allowed with costs.

BURTON, J. A., dissenting.

Baggage—Limiting Liability for.—See *Mauritz v. New York, L. E. & W. R. Co.*, and note 21 *Am. & Eng. R. R. Cas.* 286, 292; *Kansas City etc. R. Co. v. Rudebaugh*, 34 *Ib.* 219; *Baltimore & O. R. Co. v. Campbell*, 3 *Ib.* 246.

NORFOLK & WESTERN R. CO.

v.

IRVINE.

(*Virginia Supreme Court of Appeals, August 9, 1888.*)

Passenger—Transportation of Baggage—Certificate as to Contents.—A railroad company may reasonably require a peddler who has been in the habit of transporting his wares as baggage, to sign a certificate stating that his trunk contains nothing but his wearing apparel.

Same—Vexatious Litigation.—Whether a railroad company may or may not reasonably require a peddler who has been in the habit of transporting his wares as baggage to sign an *affidavit* as to the contents of his trunk, the court will not entertain an action at his instance when it appears that he had taken the trunk with nothing in it except wearing apparel and insisted that it should be checked for the patent purpose of having the agent refuse to check it unless he should sign an affidavit as to its contents, and of making such refusal the foundation for an action against the company.

ERROR to Circuit Court, Wythe County.

Trespass on the case to recover damages for an alleged wrong-

ful refusal of the defendant company to transport certain personal baggage belonging to the plaintiff. The defendant brings error to review a judgment for the plaintiff.

W. H. Boling for plaintiff in error.

Walker & Crockett for defendant in error.

HINTON, J.—This is a writ of error to a judgment of the circuit court of Wythe county, rendered at the March term, 1886, of said court. The action was trespass on the case to recover damages for the alleged wrongful refusal of the defendant company to check the plaintiff's trunk from Wytheville to the town of Marion, after it had sold him a ticket as a passenger over its road from the former to the latter station. A verdict was returned for the plaintiff for \$500. In the progress of the trial the defendant twice excepted.

The first exception is to the action of the court in refusing to give an instruction as asked by the defendant, and in giving the same instruction with a modification; and in also giving an instruction asked by the plaintiff. As to the first of these instructions complained of, it is only necessary to say that it correctly propounds the law applicable to the facts of this case as viewed from the standpoint of the defendant. That instruction is in these words:

“The court instructs the jury that the defendant company has a right to enquire of any passenger, who offers a trunk to be transported over its road, whether such trunk contains his personal baggage; and when such a passenger has been in the habit of taking with him, in his trunks, and having carried in this way, articles of merchandise, contrary to the uses and regulation of the defendant company, the carrier has a right to require him to furnish satisfactory proof of what his trunks contain, and upon his refusing or declining to furnish such proof, the carrier [in this case the defendant] is warranted in refusing to receive and check such trunks as baggage, and will not be liable in damages to such passenger [in this case to the plaintiff] for such refusal.”

As to the second instruction complained of, which it can serve no good purpose for us to set out at large, it is not only obscurely expressed, but misleading in this, that it leaves the matter in doubt whether the occasion alluded to therein as the time when “the plaintiff had not endeavored to deceive the defendant company by having his merchandise carried as baggage contrary to the rules and regulations of the company” was the occasion mentioned in the plaintiff's declaration, or some other and former occasion. It was therefore error on the part of the court not to have refused it altogether, or, if it desired to give it,

Certificate of contents of baggage—Right to require.

Regulation requiring affidavit—Vexatious litigation.

not to have so amended it as to make it appear that the occasion alluded to in the instruction was some other occasion than that stated in the declaration as the time when the defendant company had refused to check the plaintiff's trunk. *Railroad Co. v. Polly*, 14 Grat. 447; *Rosenbaums v. Weeden*, 18 Grat. 785; *Boswell's Case*, 20 Grat. 860. The regulation requiring an affidavit, whether reasonable or not, a point which we purposely decline now to decide, was necessitated in large measure by the habitual conduct of this plaintiff in evading its regulations, by carrying merchandise as baggage, and the question, therefore, which ought to have been put to the jury was, not whether they believed from the evidence that the plaintiff was attempting to evade the company's regulation in regard to the carrying of merchandise at the date specified in the declaration, but whether they believed from the evidence that he had been guilty of such acts of evasion on some former occasion or occasions; for it was only in the event that he had been guilty of these offences, on previous days and times, that the regulation required that he should make affidavit that the trunks only contained his wearing apparel. But this is not the only error in this case, for the court also erred in refusing to set aside the verdict and award the defendant a new trial; and this constitutes the defendant's second ground of exception. For, as the record plainly shows, this is but one of a series of systematic efforts on the part of this plaintiff to mulct this company in damages for its refusal to allow him to carry merchandise to be sold at auction under the head of wearing apparel. One of these cases we had occasion to consider at the last term of this court. *Norfolk & W. R. Co. v. Irvine*, 5 S. E. Rep. 533. In that case this court, speaking through Judge LACY, held, that one who was in the habit of transporting his peddler's wares as baggage, who refused to state that his trunk offered for transportation contained nothing but wearing apparel, has no cause of action for damages for refusal to carry such trunk. And it (the court) held further that a regulation requiring any such auctioneer or peddler to sign a certificate stating that his trunk contained nothing but his wearing apparel was a reasonable regulation. It is sought to distinguish this case from that, and, indeed, in the mere mode by which the plaintiff seeks to entrap the defendant into furnishing him an excuse for bringing an action for damages, there is a difference between the cases; but it is a difference neither to the credit nor advantage of the plaintiff. In the former case his object was to compel the defendant company to carry his merchandise as mere baggage on the passenger instead of the freight train, and, failing in that, to mulct it in damages. In this present case he has adopted another device for making money out of this company. Having first shown the company that his habit was to impose upon them, and to set at defiance their reasonable regula-

tion in regard to the train by which merchandise freight should be carried, he then brings this same trunk, with nothing in it, so far as the evidence shows, but some old articles of dirty wearing apparel, and insists that it shall be checked, for the patent purpose of having the agent refuse to check it unless he shall sign an affidavit as to its contents, which he has already determined not to sign, and then to make such refusal the foundation for an action against the company. The point of difference, however, relied upon by the council for the plaintiff, as distinguishing this case from the one heretofore decided by this court, is not that to which I have just averted, but is that in this case an affidavit, and not a certificate as to the contents of the trunk, was required of the plaintiff, and that such a regulation is unreasonable. In answer to this objection it is sufficient to say that, whether such a regulation is reasonable or not,—a question which we decline to decide in this case, the plaintiff is not in a position to take advantage of that circumstance, for, as the evidence produced by himself abundantly proves, he was engaged in an unjust and iniquitous effort to make money out of this company by unlawful means; and in such an effort he can never receive the aid of a court of justice. As the record shows he had at this very time no less than four suits against this company, of a character similar to one or the other of the cases mentioned herein, and his statement that he was on his way to Marion, to bring away goods that he had there, is utterly disproved by the circumstance that, according to his own testimony, up to trial of this case, he had never gone to Marion, or brought any goods away from there; nor has he ever shown that he had any goods there. He thus stands convicted of a glaring attempt to make money out of this company by anything but lawful means, and, as we have said before, in such an attempt he can never receive either the countenance or aid of any court of justice.

It follows that the judgment of the circuit court is erroneous, and must be reversed, and the suit of the plaintiff must be dismissed.

Malicious Motive of Plaintiff.—Where a railroad company had set aside a car for the use of white people only, and a colored woman refused to travel in a car similar in all respects, which was intended for the use of every one without regard to race or color, it was *held*, that as the plaintiff's purpose in attempting to enter the special car, was to harass the defendant with a view to bringing the action, the court would not entertain a suit at her instance. *Chesapeake, O. & S. R. R. Co. v. Wells*, 31 Am. & Eng. R. R. Cas. 111.

An action was brought by a plaintiff as a creditor and stockholder of a railroad company for the purpose of compelling the officers of the company to account for official conduct in the management and disposition of its funds and property. The defendants pleaded that the suit was not brought in good faith for the purpose avowed by the complaint, but was an attempt to abuse the process of the court for purposes of retaliation and revenge, and that the plaintiff had become holder of the stock and bonds with a full knowledge of the acts of

which ne complained, and for the purpose of bringing an action. It was *held*, that as the plaintiff was in fact the owner of bonds and stock of the company, he was personally interested in obtaining the relief sought by him, and that, having a right of action, the intent with which he purchased the stock and bonds did not affect that right, his bad faith not being such as the courts relieved against. *Ramsey v. Gould*, 57 Barb. (N. Y.) 398.

PITTSBURGH, CINCINNATI AND ST. LOUIS R. CO.

v.

LYON.

(*Pennsylvania Supreme Court, January 7, 1889.*)

Passenger—Transfer of Baggage—Reasonable Regulations.—A regulation by a railway company which has five passenger stations within the corporate limits of a city, to sell tickets only to the station which forms the terminus of the road, and only to check baggage to that station, though the other stations are regular stopping places for passenger trains, is unreasonable and void as matter of law, even though it be made for the purpose of preventing the transfer of passengers and baggage to a rival road.

Same—Punitive Damages.—Where a railroad company declines to sell a ticket to a regular stopping place and to deliver the passenger's baggage there, the jury may award exemplary damages if the company acts wilfully, maliciously or so negligently as to indicate a wanton disregard of the rights of others.

ERROR to Court of Common Pleas, Washington County.

Action on the case of James A. Lyon against the Pittsburgh, Cincinnati & St. Louis R. Co. to recover damages for wrongfully refusing to deliver plaintiff's baggage to him at a regular passenger station upon the defendant's road. The defendant brings error to review a judgment for the plaintiff.

A. M. Todd for plaintiff in error.

A. W. & M. C. Achson for defendant in error.

STERRETT, J.—One of the questions presented for our consideration is whether the regulation of the railway company in conformity to which its agents refused to sell plaintiff below a ticket to Birmingham station, and to check or deliver his baggage there, is unreasonable, and therefore unlawful. The facts upon which that and subordinate questions depend are undisputed. It appears from the evidence that the company has five passenger stations within the corporate limits of Pittsburgh, viz., Temperanceville, Point Bridge, Birmingham, Fourth Avenue, and Union Depot, the eastern terminus of the road. Birmingham station, about a mile south of the latter, and diagonally across the street from the

Facts.

eastern or terminal station of the Pittsburgh & Lake Erie Railroad, is a regular stopping place for passenger trains, and admittedly the most convenient point for transfer of passengers and baggage coming into the city on plaintiff in error's road, and proceeding westward by the Pittsburgh & Lake Erie road. In March last, the time between the arrival of morning train on the former and departure of train on the latter road was about twenty-five minutes—amply sufficient to make transfer from one road to the other at Birmingham station. At the time above mentioned, plaintiff below bought from the Pittsburgh & Lake Erie Company's agent at Washington, Pa., a ticket for passage from Pittsburgh to New Orleans. He then applied to plaintiff in error's agent for a ticket from Washington to Birmingham station, intending to proceed thence on his journey without any delay at Pittsburgh; but, being informed that it would be necessary for him to buy a ticket to Union Depot station, he was obliged to accept that or nothing. He then requested that his baggage be checked to Birmingham station, or so marked that it would be delivered to him there. That was also refused, and he then notified the baggage master that on arrival of train at that station he would demand, and expect to receive, his baggage. The demand was accordingly made, but it was unheeded, and the trunk was carried to the Union depot. The alternative was thus presented of either waiting in Pittsburgh until he could obtain his baggage, or proceeding on his journey without it. He chose the latter, stopped off at Cincinnati, and there awaited the arrival of his baggage, which, by his direction, was obtained and forwarded after him. The reasonable requests of plaintiff below were refused by the company's agents in obedience to previous orders from their official superiors, and not for the purpose of intentionally subjecting him to the inconvenience and annoyance that necessarily resulted, and which the officer giving the order must have known would result therefrom. The orders that were given were not disowned by the company. On the contrary, it undertook to justify them as a valid and proper exercise of its power to make and enforce reasonable rules and regulations for the transaction of its business.

In view of the undisputed evidence of what occurred, the inconvenience, annoyance and delay to which plaintiff below was arbitrarily and unnecessarily subjected, the learned president of the common pleas instructed the jury that the regulation in question was unreasonable and invalid. After reciting the facts, he said, among other things: "The question arises whether or not selling tickets to a certain point, or to the city of Pittsburgh, and allowing parties to get off at any of these stations under a ticket which would take them to the Union Depot sta-

Regulation as to baggage unreasonable.

tion, they have a right to lay down a rule by which, although the party might get off himself, he would be compelled to go to the Union station for his baggage. I say such a rule is unreasonable, and one the company had no right to make, and therefore the existence of a rule of that kind, with reference to passengers, was a violation of their duty. While the inferior officers of the road may be justifiable in obeying the rule, yet it is such a rule that the company had no right to make, and they become responsible in damages if they undertake to enforce it as against passengers. I put it upon the broadest ground. But there is a narrower ground on which it might be put. It seems they did allow parties, not only to get off themselves—because that is unquestioned—but they did allow certain parties—commercial travellers—parties holding 1000-mile tickets, and on some other occasions other parties—to get off, and take their baggage off at that point. But it is immaterial whether or not the party is going by the Lake Erie road or going to Birmingham, or wherever he may go; it is a question of right, so far as the citizen is concerned," etc. It is contended that the above-quoted instructions, and others of like import, were erroneous, in that they entirely withdrew from the consideration of the jury the reasonableness or unreasonableness of the regulation under consideration, and disposed of it as a question of law. While this position is not without the sanction of respectable authority, the better opinion appears to be that the question is generally a mixed one of law and fact. So far as the reasonableness of a given rule depends upon the existence of particular facts and circumstances, it is necessarily a question for the jury, under proper instructions from the court; but, if the facts are undisputed, the question is a proper one for the court. *Old Colony R. Co. v. Tripp*, 33 Am. & Eng. R. R. Cas. 488, 496, notes, and authorities there cited. As was said in *Vedder v. Fellows*, 20 N. Y. 126, 131: "There are strong reasons why the reasonableness of railroad regulations should be submitted to the court as a question of law, rather than to the jury as one of fact. Ordinarily, jurors are not aware, nor can they readily be made aware, of all the reasons calling for the rule. . . . What one jury might deem an inconvenient rule another might approve as judicious and proper. There would be no uniformity." The facts of the case at bar being indisputable, it was clearly the province of the court to say, as matter of law, whether the regulation in question was reasonable or not; and it was rightly held to be unreasonable and invalid. It was of such an arbitrary and vexatious character that no tribunal, court, or jury could well declare it otherwise.

**Reasonableness
of regulation—
Province of
court and
jury.**

Another question is whether the case, as presented by the evi-

dence, is one in which the jury should have been restricted to actual or merely compensatory damages. We think **Exemplary damages.** not. In actions in contract—except promises to marry—the amount recoverable is limited to the actual damages caused by the breach; the measure being the same whether the defendant fails to comply with his contract through inability, or wilfully refuses to perform it. But in torts the rule is different; the motive of the defendant becomes material. In those that are committed through mistake, ignorance, or mere negligence, the ordinary rule is mere compensation; but in such as are committed wilfully, maliciously, or so negligently as to indicate a wanton disregard of the rights of others, the jury are not restricted to compensation merely. They may, if the evidence justifies it, give vindictive or exemplary damages, such as will not only compensate the injured party, but at the same time tend to prevent a repetition of the wrong, either by the defendant or others.

It is claimed that the regulation complained of was obstructive in its purpose, intended to prevent the transfer of passengers and their baggage from plaintiff in error's road to a rival railroad. The fact may be so, but it is unnecessary, **Defendant's duty to travelling public.** in this case, to enquire whether it is or not. It is enough to know that the travelling public have some rights, one of which is the transportation of themselves and baggage over any of the railroads of the commonwealth; and that includes the right to stop and receive their baggage at any regular station or stopping-place for the train on which they may be travelling. Any regulation that deprives them of that right is necessarily arbitrary, unreasonable and illegal. The fact must not be ignored that corporations are artificial persons, created for specific purposes, and invested with such, and only such, powers as are conferred by law. While natural persons may do with themselves and their property whatever is not forbidden, artificial persons cannot rightfully do anything that is not expressly or by necessary implication permitted by the law of their being. Plaintiff in error was incorporated as a common carrier of freight and passengers. As such it owes a duty to the travelling public which it cannot arbitrarily and wilfully ignore. It is unnecessary to further consider either of the specifications of error. The case was correctly tried, and plaintiff in error has no just reason to complain of the result.

Judgment affirmed.

Rules and Regulations of Railroad Companies.—See notes, 5 Am. & Eng. R. Cas. 527; 9 Ib. 122; 9 Ib. 304; 11 Ib. 191; 33 Ib. 296.

LAFFREY

v.

GRUMMOND.

(Michigan Supreme Court, February 15, 1889.)

Baggage—Destruction by Fire—Warehouse.—Where a passenger on board a steamboat checks his baggage through to his destination and, having taken advantage of his stop over, the baggage is warehoused subject to delivery on call and presentation of check, the carrier is not liable for its loss by fire while in the warehouse.

ERROR to Circuit Court, Wayne County.

Action by Mary Laffrey against Stephen B. Grummond to recover damages for the destruction by fire of plaintiff's baggage. Defendant brings error to review a judgment for the plaintiff.

Edwin F. Conely for appellant.

Stewart & Galloway for appellee.

CAMPBELL, J.—Plaintiff sued defendant as owner of a passenger steamer for baggage destroyed by fire on land in a warehouse. The facts, as practically established, were **Facts.** these: Plaintiff lives in Detroit, but was on July 29, 1887, at St. Ignace, in Mackinac county, and desired to return to Detroit, stopping at Alpena by the way. Defendant owned two boats, the *Flora* and the *Atlantic*, running from St. Ignace to Detroit, and continuously across Lake Erie—the *Flora* to Toledo, and the *Atlantic* to Cleveland. Both stopped in due course at Alpena and Detroit. Plaintiff took passage on the *Flora*. She told the clerk she wanted to stop at Alpena for a short time to get an abstract, and it would require a stay of half an hour. She was told that the boat would stop about two hours, and she could take her ticket straight through to Detroit. The steamer was behind time, and she was advised before reaching Alpena to take a stop-over check, and come down on the next steamer, as she could not probably wait long enough. Plaintiff did so, and, after finishing her business, found the boat gone. Before landing at Alpena she asked the porter if she had better remove her baggage, and he told her if it was put off, and she returned in time, it would have to be put on again, and, if she did not return, it would be all right, and would be taken care of. Her baggage had been checked through to Detroit. On reaching Detroit the baggage was put in Ashley & Mitchell's warehouse, they being defendant's Detroit agents, and was burned without fault that night. The

Atlantic arrived, in due course, four days later. The court below ruled that defendant was liable for the baggage absolutely, and not exempted by the fire.

There is some variance in the authorities concerning the circumstances which terminate a passenger carrier's liability, and they are not entirely harmonious in principle, and they are not uniform on different lines of carriage. The doctrine which holds passenger carriers liable for baggage has not always existed, and has grown up out of changes in methods of carriage. It has always differed somewhat, in regard to conditions of delivery, from the liability attaching to handling freight; and, while it is very generally and properly spoken of as a duty arising from the relation of common carriage, it is also treated by various writers as in many respects analogous to the duties of innkeepers. It is certainly quite similar to the duty of innkeepers in the case of passenger steamers on long trips, the main business of which is boarding and lodging passengers, the carriage of whose baggage is purely incidental. The extent of a carrier's liability concerning a passenger's baggage was discussed by an equally divided court in *McKee v. Owen*, 15 Mich. 115. In that case a steamboat owner was sued for property claimed to have been stolen from a state-room while the passenger was asleep. The court below gave judgment for defendant. The opinion of two judges for reversal placed the liability on the ground that the defendant was, as to the loss in question, in the position of an innkeeper. The opinion in favor of affirmance held he was not an innkeeper in fact, and that as passenger carrier he was not so broadly liable as an innkeeper, and only liable for articles placed in his custody. The case, therefore, decided nothing beyond the fact that the liability for baggage is not larger than that of an innkeeper, although in some respects analogous. It was subsequently held by this court that an innkeeper is not liable for loss by accidental fire. *Cutler v. Bonney*, 30 Mich. 259. The acts of congress do not hold a carrier by water liable for such a fire. *Moore v. Transportation Co.*, 5 Mich. 368, affirmed by the supreme court of the United States in 24 How. 1. In order to hold defendant here, it must be held that his liability exceeds that of an innkeeper. It must also be held that a liability that did not exist while the baggage was in transit on board the steamer was created when the transit ceased, and the baggage was put into warehouse. This seems to be unreasonable.

When Mrs. Laffrey arranged as she did arrange to have her baggage forwarded, she had a right to expect it would not be neglected, and would be properly cared for; but she was also bound to expect that it would be dealt with in the usual way, and would be left in Detroit, and not kept on board the steamer, which

had a further destination. She held the check for it, which prevented delivery to any one else, and she was to come down on another boat some days later. The baggage would necessarily be landed and cared for in a warehouse, which in this instance was not the warehouse of defendant, but was owned by other parties, who acted as local agents, as is usual for steamboats. The baggage was subject to delivery on call and presentation of the check; but plaintiff expected delay, and that it must be some days, at least, before it would be called for, and must be stored meanwhile in some way. The reasonable view seems to us to be that the warehousing at the termination of the transit was within the contemplation of both parties; and it also seems to us that it would be irrational to create a constructive relation of carriage, after the real carriage terminated, which should involve a larger responsibility than the actual carriage, and to hold defendant for a loss by fire in a warehouse which is not chargeable to a warehouseman as such, and would not have been chargeable to defendant if it had happened on board. We can get no particular help from comparing precedents, but we think there is no rule which under our own decisions should create an exceptional liability against defendant.

The judgment should be reversed, with costs, and a new trial granted.

The other justices concurred.

Baggage—Liability for Loss of.—A common carrier is liable as such for the personal baggage of a passenger delivered to and received by it solely for transportation, and not for storage, although for the convenience of the carrier the passenger consents to some delay in the transportation. So held in a case in which a passenger indicated to the station master that he did not care whether his baggage was forwarded on the next train or not, and the baggage was destroyed by the burning of the baggage room the next day. The court were of the opinion that the liability of the company carrier attached at the time of the delivery of the baggage to the defendant company. *Shaw v. Northern Pacific R. Co.* (Minn.), 41 N. W. Rep. 548.

Same—Checks—Depot Company.—Where a railroad company's trains by an arrangement with a depot company regularly enter and depart from the depot of the latter and it is entrusted with the business of handling and checking the baggage of its passengers and furnishing checks therefor, the depot company is the agent of the railroad company in respect to such business. *Ahlbeck v. St. Paul, Minneapolis & Manitoba R. Co.* (Minn.), 40 N. W. Rep. 364.

The possession of a baggage check by a railway passenger is *prima facie* evidence that the carrier has received and is in possession of his personal baggage; and where he delivers such check to the agent of a connecting railroad company, and receives its check in exchange therefor, the presumption is, in the absence of proof to the contrary, that the baggage is received in due course by the latter company, and it is responsible therefor. *Ahlbeck v. St. Paul, Minneapolis & Manitoba R. Co.* (Minn.), 40 N. W. Rep. 364.

Same—Measure of Damages.—In an action in which the plaintiff sued to recover the value of a suit of clothes alleged to have been taken from his baggage, the testimony showed that the suit in question cost \$45. It had been worn but a few times, and one witness, who was a dealer in clothing, stated that its market value at the time of the loss was \$22.50. The jury returned a

verdict of \$40, and it was urged that the verdict was excessive and that it should not have been for the sum in excess of the market value. The court held that the measure of damages was the value of the goods to the owner,—not any fanciful price that he might for special reasons place upon them, nor, on the other hand, the amount for which he could sell them to others, but the actual loss of any money he would sustain by being deprived of articles so specially adapted to his own use,—and, accordingly, that the verdict was not excessive. *Missouri Pacific R. Co. v. Colquitt* (Tex.), 9 S. W. Rep. 603.

Same—Extra Compensation for Overweight—Emigrant.—The mere payment of extra compensation on account of the overweight of baggage does not convert such baggage into freight, and where merchandise to be used in trade is packed in a trunk, and shipped as personal baggage, the carrier having no notice of the contents of such trunk, the liability of the latter therefor as a common carrier, does not attach. But in the case of an emigrant who carries with her trunks and other ordinary baggage, and also turns over to the common carrier a number of boxes of goods for transportation, and pays freight for their weight in excess of her baggage allowance, and the general character of the shipment is known to such carrier, it would be unjust to conclusively presume the entire shipment was as baggage, and that there could, in case of loss, be no recovery, except for such articles contained in the boxes as would properly be designated as "necessary baggage." *Hamburg American Packet Co. v. Gattman* (Ill.), 20 N. E. Rep. 662.

Same—Carrier's Liability for Loss.—When a carrier's liability for baggage ceases, see *Hoeger v. Chicago, M. & St. P. R. R. Co.* and note, 21 Am. & Eng. R. R. Cas. 308, 312; *Clark v. Eastern R. R. Co.*, 21 Am. & Eng. R. R. Cas. 307.

GREEN AND BARREN RIVERS NAVIGATION CO.

71.

CHESAPEAKE, OHIO AND SOUTHWESTERN R. CO.

(*Kentucky Court of Appeals, December 11, 1888.*)

Bridge—Navigable River—Power of State.—When a navigable river is entirely within the boundaries of a state, the state legislature may authorize the building of a bridge or other structure which tends to obstruct the navigation, and such power is only limited by the constitutional provision conferring upon Congress the right to regulate commerce between the states, when Congress has declared that such obstructions are an unlawful exercise of the power of the state.

Same—Line of Navigation—Lease.—The state of Kentucky, having improved the navigation of the Green & Barren Rivers by means of locks and dams, incorporated a navigation company and leased to it "the Green & Barren River line of navigation, together with the grounds, houses, etc., and all the franchises thereunto belonging or appertaining." The lessee was required to keep the line of navigation in repair and to permit water craft to navigate the rivers upon the payment of tolls. *Held*, that the navigation company only acquired an exclusive right to the use of the locks and dams and other improvements, that its interest in the right of navigation was the same as belonged to the public generally, and that the state might, without impairing any contract entered into by it, authorize a railroad company to construct a bridge across the river.

Same—Obstruction of Navigation—Damnum Absque Injuria.—The repair of the bridge having become necessary, the railroad company gave notice to the navigation company of its intention to execute the necessary repairs. The

repairs were made at a time of year when it was likely to interfere with navigation the least, and no unreasonable delay took place. *Held*, that the railroad company was not bound to adopt an unusual and expensive course in executing the repairs for the purpose of leaving the navigation entirely free, and that any loss sustained by the navigation company from the interruption was *damnum absque injuria*.

APPEAL from Louisville Law and Equity Court.

Action by the Green & Barren Rivers Navigation Company against the Chesapeake, Ohio & Southwestern R. Co., to recover damages for an alleged unlawful obstruction of the navigation of the Green River. The plaintiff appeals from a judgment for the defendant.

Wright & McElroy and *Alex. P. Humphrey* for appellant.

John Mason Brown and *George M. Davie* for appellee.

HOLT, J.—The legislature of Kentucky chartered the Memphis, Paducah & Northern Railroad Company on March 25, 1878. It also incorporated the Chesapeake, Ohio & Southwestern Railroad Company on January 19, 1882. **Facts.**

The last-named corporation was at the time of its creation the owner of so much of the first-named road as had then been constructed from Memphis, Tenn., to Paducah, Ky.; and its charter conferred upon it certain powers and privileges that had been granted to the Memphis, Paducah & Northern Railroad Company. The charter provision of the last-named corporation, which was, by reference to it in the appellee's charter, made a part of it, and which is material to the proper consideration of the questions now presented, is as follows: "Sec. 19. The board may provide for the construction of telegraph lines, workshops, warehouses, bridges (so as not unreasonably to obstruct the navigation of any navigable stream), and other buildings and erections, and for conducting them, and such other operations as may be necessary and convenient to the most efficient operation of the railroad of the company for the common carriage of freight and passengers." Prior to 1883 the appellee's road had in conformity to its charter been extended from Paducah northward to Louisville; and as a part of this extension, and under its legislative grant, the company had erected across the Green river, at Rockport in this state, a bridge, with a revolving or draw span, so as to admit of the passage of boats and other craft navigating the river. In November, 1883, it became necessary to replace this draw span with a new and more improved one; and to this end appellee caused notice to be published that it would close the channel of the river under the span from December 5 to about December 31, 1883. It also had notice of its intention to do so served upon the appellant, the Green & Barren River Navigation Company, a lessee from the state under an act approved March 9,

1868, of the locks, dams, and other improvements erected by it upon Green and Barren rivers, and the owner of a line of steamboats plying upon these waters between Bowling Green, in this state, and Evansville, Ind. There is no complaint of want of proper notice. Accordingly the railroad company, over the protest of the navigation company, closed the draw span by the erection of false work under it, and it thus remained until January 22, 1884, a period of 47 days. No unnecessary time was consumed, however, in the erection of the work, and during 15 of the 47 days, navigation was prevented upon the appellant's line by ice in the Ohio river. The lower court in its finding of facts found that the obstruction of navigation might have been altogether avoided by throwing open the draw span, and erecting the false work along the river bank, upon the edge of which the draw pier stood. Doubtless this would have been possible; but it would not only not have served the railroad, but have been an unusual mode of erecting such structures, requiring more time for its completion, and involving 50 per cent., or at least a much greater cost. While the navigation was thus obstructed the navigation company continued the operation of its line, save when prevented by ice, by running one of its boats upon the upper and the other upon the lower end of it, and by transferring its passengers and freight from one boat to the other over the deck of a barge anchored under the bridge. It brought this action to recover damages consequent upon the obstruction. The lower court found that it caused one of appellant's boats to remain idle and partially manned at Rockport during the closing of the span, at an expense of \$1,585.25. We fail to understand why this was either a necessary or a reasonable result. The bridge was not far from the middle point upon its line of navigation. It seems to us that one boat could have been constantly plying between the bridge and one end of the line, and the other between the bridge and the other end, the two meeting at the bridge, thus avoiding the detention of one boat at the bridge while the other went from it to the other end of the line and returned. As it was a finding of fact, however, we will regard it as well founded. The judge below also found that a reasonable rent of the barge, etc., was \$1,551, thus fixing the entire damage at something over \$3,000; but he dismissed the claim upon the ground that the legislative grant to the railroad company to make the improvement was valid, and that it in doing so had kept within its terms.

The Green and Barren rivers are navigable streams, and entirely within the boundary of this state. They are public highways by nature or of common right. They exist by common law, and the public can only be deprived of their free use by legislation. Although they are national as well as state highways, and besides

serving the purposes of internal commerce also facilitate commerce between the states, yet it is well settled that in the absence of legislation under that clause of the constitution of the United States giving to congress the power to regulate commerce between the states, a state has plenary power over a navigable stream altogether within its borders. In such a case, until congress intervenes, the legislature of the state is sovereign. It may as to such a stream, and in the absence of national legislation, enact a law which incidentally may have a material influence upon commerce between the states. Such a river is not outside of state jurisdiction so long as congress does not interfere. The mere grant of the power to the national legislature to regulate commerce between the states is not *per se* an inhibition upon state legislation as to a navigable river entirely within its boundary. It is quite proper that it should in such a case regulate its internal commerce as a part of its internal police. The supreme court of the United States, speaking upon this subject in the case of *Hamilton v. Vicksburg, S. & T. R. Co.*, 119 U. S. 280, 29 Am. & Eng. R. R. Cas. 490, said: "As has often been said by this court, bridges are merely connecting links of turnpikes, streets, and railroads; and the commerce over them may be much greater than that on the streams over which they cross. A break in the line of railroad communication from the want of a bridge may produce much greater inconvenience to the public than the obstruction to navigation caused by a bridge with proper draws. In such cases the local authority can best determine which of the two modes of transportation shall be favored, and how far either should be made subservient to the other." We regard it as now settled beyond question that a state legislature may at least authorize the building of a bridge or other structure tending to obstruct the navigation of a navigable river, which is altogether within its own boundary; and it is only when congress, by virtue of the constitutional provision, acts as to such obstructions that its will must be obeyed so far as may be necessary to insure free navigation. *Wilson v. Marsh Co.*, 2 Pet. 245; *Cardwell v. Bridge Co.*, 113 U. S. 205; *Transportation Co. v. Chicago*, 99, U. S. 635; *Hamilton v. Vicksburg, S. & T. R. Co.*, *supra*. In fact, many of the cases hold that the obstruction may go to the extent of entirely destroying the navigation of the stream. The appellant contends, however, that it stands in a different attitude from the general public as to the right of the state to obstruct Green river, or to authorize it to be done by the building or repairing of a bridge. It insists that the legislature had no right, after making, and during the continuance of the 30-years lease to it, to pass any law repealing or

**Navigable
rivers—
Power of
state—Inter-
state com-
merce.**

**Same—
Obstruction
of stream—
Impairing
obligations
of contract.**

abridging the privileges conferred by it, because to do so would impair the obligation of the contract; and that the state cannot obstruct its navigable streams, or authorize it to be done, if congress has legislated as to it under the commerce clause, or if to do so would violate a contract made by the state with an individual or a corporation. It becomes necessary, therefore, to ascertain what rights the appellant did in fact acquire by its lease. The rights of the parties to this controversy are not to be determined by the relative importance of river or railroad transportation to the commerce of the country. We have no right to compare benefits, or contrast injuries. Whether one, and, if so, which one, is to be subservient to the other, is a question addressed to the legislature, and not to the judiciary. Prior to March 9, 1868, the state had improved the navigation of Green and Barren rivers by means of locks and dams, and tolls were charged for their use. The money thus realized proved inadequate to maintain and operate the improvements, and the enterprise was a losing one to the state. The legislature, by an act of the date last named, incorporated the appellant, and, in the language of the second section of the act, leased to it the "Green and Barren River line of navigation, and their tributaries, together with the grounds, houses, water works, rents, profits, tools, machinery, implements, and appurtenances, and all the franchises thereunto belonging or appertaining." The act requires the company to keep "the line of navigation" in repair, and to permit all water craft to navigate the rivers upon the payment of certain rates of toll prescribed by it. The constitutionality of this act, and the validity of the lease based upon it, were maintained by this court in the two cases of *McReynolds v. Smallhouse*, 8 Bush 447, and *Sinking Fund v. Navigation Co.*, 79 Ky. 73. What, then, was the extent of the property right thus acquired by the appellant? Manifestly it did not confer upon it an exclusive right of navigation. It was not a lease of the rivers themselves. The company did not during the term of the lease acquire such a right in them as it would have obtained under a lease of a canal or turnpike. The public had a natural right to use them before the state improved them. They were not the subjects of private ownership. The company acquired no exclusive right of fishing in them, or using the water for motive or irrigating purposes. What, then, was intended by the expression "line of navigation," as used in the act? The history of the matter, and the existing circumstances, will serve to explain it. The rivers themselves were navigable streams, open to public use by common right. The state had, however, erected locks and dams, and other subsidiary improvements. Tolls were being charged for their use, by the state, when the lease was made. These improvements belonged to it, and not to the public by any common right. They consti-

tute its line of navigation; and it leased what belonged to it in its corporate capacity, as distinguished from what was subject to public use under common right. Properly speaking, these improvements were all the state had to lease; and although the grant should be construed strictly, yet a fair interpretation of the act of the legislature confines its operation to the property of the state. The fourth section requires the company "to use due diligence in keeping up said line of navigation in good repair." These words certainly refer to the improvements only, and aid us in reaching a conclusion as to what was meant by the words "the line of navigation." The company acquired no peculiar right in the navigation of these rivers under its lease. As to it the appellant occupied the same attitude as the general public; and as none of the improvements have been injured or interfered with, and as the licence to bridge the river was valid against the public, it results that the appellant cannot complain if the appellee in repairing its bridge has kept within the grant. It is not a case of two interfering franchises, because the contract between the state and the navigation company invested the latter with the exclusive proprietorship, during the lease, of the improvements only, and not the navigation of the river. This court, in effect, so held in the case of *Navigation Co. v. Palmer*, 83 Ky. 646, and it is unnecessary to consider the question of the power of the state to barter away the control of its navigable streams, which is a part of its internal police power, because it has not attempted to do so in this instance. It is reasonable to suppose that the parties so understood the contract. If the bridge had not been constructed when the lease was made, then the acquiescence of the appellant in its construction under legislative grant, and the knowledge that it would necessarily need repair, shows how it regarded the contract. Upon the other hand, if it had already been constructed, then the company knew that its repair and renewal would follow as a duty to the travelling public, and as necessary to its convenience and safety; and it is unreasonable to suppose that the parties intended to enter into a contract forbidding such repair.

The work was done at a season of the year when it was likely to interfere with navigation the least. Ample notice was given that it would be done, and it was done as expeditiously as possible. In fact it is not claimed that there was any unreasonable delay, or that the obstruction continued longer than was necessary. It is plain that nothing was done negligently or wantonly, but that the appellee acted in good faith, and with proper precaution. While it was possible to have opened the draw and constructed the new one upon the edge of the river, and thus have avoided all obstruction to navigation, yet the rail-

**Obstruction
of naviga-
tion —
Damnum
absque
injuria.**

road company was not required to take an unusual course in constructing its improvement, and one which would involve unreasonable delay and expense. It was done in such a manner as "not unreasonably to obstruct the navigation," and the appellee is entitled to the protection of the rule of *damnum absque injuria*. Judgment affirmed.

Navigable Waters Between States—Power of Congress.—Under the power vested in Congress by the provisions of the Constitution of the United States, Congress may open commercial communication between different states by land, as well as by water, and it may competently grant the power to construct a bridge across navigable waters, between two different states without obtaining the consent of the states in which the structure is to be erected. Accordingly, a state statute prohibiting the erection of a bridge over navigable waters separating the state from other states, except such erection be authorized by the legislature, is unconstitutional and invalid as against a grant of power to construct a bridge contained in an Act of Congress in favor of a citizen or corporation in another state. It was, therefore, held that an act authorizing the construction and maintenance of a railroad bridge across the Staten Island Sound, known as "Arthur Kill," and declaring it to be a post road was constitutional and a valid exercise of the legislative power of Congress. *Stockton v. Baltimore & N. Y. R. Co.*, 32 Fed. Rep. 9.

The shore and lands under navigable streams of water are vested in the respective states, but the right of the states therein is not "private property" within the meaning of the provisions of the United States Constitution requiring that private property shall not be taken for public use without just compensation. *Stockton v. Baltimore & N. Y. R. Co.*, 32 Fed. Rep. 9.

Construction of Bridge—Repairs—Obstruction of Navigation.—A railroad company acquires as a necessary incident to a grant of authority to bridge a navigable stream, the right to repair the bridge; and, if, in effecting repairs, the necessary piling is driven in an ordinary and skilful manner, loss occasioned thereby by reason of the obstruction of the navigation to a person who uses the stream to raft logs, is *damnum absque injuria*. A railroad company repaired its bridge across a navigable stream in the winter of 1884-1885 after the ice had formed on the river, and at the completion of the repairs the piles used were cut off at the surface of the water. As the ice sank, the stumps were again cut, so that, when the ice went out, the tops of the piles were from 18 to 30 inches below the surface of the water. Plaintiff sent logs down the stream in rafts until July, when the water became so low as to render the stream unnavigable by rafts even if the stumps had been removed. *Held*, that the piling was properly removed, having been cut off so far below the surface that the stumps did not obstruct river when it was susceptible of navigation. *Central Trust Co. of New York v. Wabash, St. Louis & Pacific R. Co.*, 32 Fed. Rep. 566.

Navigable Streams—Construction of Bridges.—The right to authorize the construction of a bridge primarily belongs to the Congress of the United States, but individual states may also exercise the right, subject, however, to the paramount authority of Congress. Note, 17 Am. & Eng. R. R. Cas. 157, and cases there cited. But although the legislature of a state may authorize the construction of bridges across navigable waters, such bridges must be so constructed and maintained as not materially or unnecessarily to obstruct navigation. *Sweeney v. Chicago, M. & St. P. R. Co.*, 60 Wis. 60; s. c., 20 Am. & Eng. R. R. Cas. 268. The conditions imposed in the act authorizing the construction must be complied with, and a failure to comply with them gives a right of action to a party suffering special damages thereby; note, 17 Am. & Eng. R. R. Cas. 157 and cases there cited; *Missouri River Packet Co. v. Hannibal & St. J. R. Co.*, 79 Mo. 476; s. c., 20 Am. & Eng. R. R. Cas. 275. The fact that the nuisance is a public one, does not affect the right of a person who has suffered special injury

therefrom to recover. *Little Rock M. R. & T. R. Co. v. Brooks*, 39 Ark. 403; s. c., 17 Am. & Eng. R. R. Cas. 152.

An authority to construct a railroad between two given points carries with it an implied authority to construct necessary bridges across navigable waters. Note 13 Am. & Eng. R. R. Cas. 172, and cases there cited; *Hughes v. Northern Pacific R. Co.*, 13 Am. & Eng. R. R. Cas. 157; *People v. Potrero & B. B. R. Co.*, 67 Cal. 166. If a railroad, without authority, commences the construction of a bridge and thereby obstructs navigation, statutory authority subsequently granted will constitute no defence to an action for special damages sustained previous to the granting thereof. *Smith v. Louisville, New Orleans & Texas R. Co.*, 62 Miss. 510.

When Congress has not prescribed any place for the construction of a bridge, the right of the company is subject to the judgment of a proper court as to whether it is being constructed without unnecessary injury to the navigability of such river upon the complaint of any one specially injured thereby, or likely to be. *Hughes v. Northern Pacific R. Co.*, 13 Am. & Eng. R. R. Cas. 157.

A bridge having become decayed, the railroad employed a contractor to construct a new bridge in its place, the work to be done at the time of year when it would least obstruct navigation. The contractor complied with his contract as to time, but owing to the unusual rains, the river continued navigable, and the work was unavoidably prolonged thereby, obstructing navigation and preventing the vessels of plaintiff in passing beyond the bridge. *Held*, that any loss suffered by plaintiff was *damnum absque injuria*. *Hamilton v. Vicksburg, S. & P. R. Co.*, 119 U. S. 280; s. c., 29 Am. & Eng. R. R. Cas. 490.

It is the duty of a railroad company owning a bridge across a navigable stream to prevent such accumulations of drift about its piers, either above or below the surface of the water, as might endanger navigation, and upon a failure of the company to use due diligence, it is liable for damages to those navigating the stream in absence of contributory negligence on their part. *St. Louis, Iron Mountain & Southern R. Co. v. Meese*, 44 Ark. 414. But, on the other hand, it has been held, that if the piers were constructed according to the known requirements of bridge building, and in such a manner as to prevent, as much as possible, the accumulation of drift against them, the company will not be liable for injuries to a boat caused through its striking a log lodged against a pier and submerged from view. *Ward v. Louisville & Nashville R. Co. (Tenn.)*, 3 Am. & Eng. R. R. Cas. 506.

McCLENEGHAN

v.

OMAHA AND REPUBLICAN VALLEY R. CO.

(*Nebraska Supreme Court, January 4, 1889.*)

Bridge—Sufficiency—Obstruction of Stream.—A railroad corporation, although authorized by law to construct its road across a stream, is liable for damage done to lands adjacent thereto by the construction of a bridge, which causes the water and ice to gorge and overflow such land; and in the selection of the character of bridge to be built, due regard must be had to the rights of the adjacent land owners, as well as to the safety of the public who may travel over its road, or who may require the use of the same for the transportation of property.

ERROR to District Court, Saunders County.

Action by Samuel McCleneghan against the Omaha & Repub-

lican Valley Railroad Company to recover for damages for injuries sustained through the flooding of plaintiff's land. Plaintiff brings error to review a judgment for defendant.

W. H. Munger and E. F. Gray for plaintiff in error.

J. M. Thurston and W. R. Kelly for defendant in error.

REESE, C. J.—This action was instituted in the district court of Saunders county for the recovery of damages resulting from the alleged negligent construction of the railroad bridge of defendant in error across the Platte river, by which an unlawful obstruction is alleged to have been erected in the river, which prevented the natural flow of the ice and water therein, and caused the ice and water to gorge, back up, and overflow the banks of said river, to the injury of plaintiff's farm and the property thereon. A jury trial was had, which resulted in a verdict and judgment in favor of defendant in error, who was defendant below, and from which plaintiff brings the case to this court by proceedings in error. A large mass of testimony was submitted to the jury, about 80 witnesses having been examined, and in which there was a sharp conflict upon almost every question at issue in the case. The preponderance of the evidence was largely in favor of defendant, and will not be examined further than to say that the verdict of the jury was clearly supported thereby. The case is presented solely upon errors of law occurring at and after the trial, and it is argued that, even though the preponderance of evidence was against plaintiff, yet he had the right to have the case fairly submitted to an impartial jury, whatever the testimony might be. A large number of errors are presented, but few of which will be examined, as the same questions will not likely arise upon a retrial, should one be had.

From the testimony introduced, and from the instructions asked by the parties to the action, it plainly appears that the case was presented to the jury upon these two theories contended for by the parties to the trial: On the part of plaintiff it was contended that the bridge was so constructed as to unnecessarily impede the flow of the river, and thereby cause the water and ice to dam up and gorge above the bridge, which necessarily resulted in an overflow of the land owned by plaintiff, opposite and below the gorge; while, upon the other hand, it seems to have been contended by defendant that the highest obligation resting upon it in the construction of the bridge was that of its safety and use in the general requirements of railroad traffic.

Edmund Lane, the engineer who constructed the bridge, was called as a witness for the defendant. He testified that his occupation was that of a civil engineer; that he had followed that profession about twenty years, nineteen of which had been in

the state of Nebraska. He testified as to the history and habits of the Platte river, having had a general knowledge of it since 1871 or 1872, and having constructed seven or eight bridges across it during the time referred to. That in the construction of a bridge across a river similar to the Platte, the first and primary consideration would be to provide for the passage of the water, and to avoid obstruction of ice, or drift-wood, or any other things which might be expected from the general character of the stream; and next, the strength and durability of a bridge required for the traffic. We quote briefly from his testimony, as follows: "*Question.* Taking into consideration the state of engineering, skill, and knowledge as it existed in 1876 (the time of the construction of the bridge in question), together with such knowledge of the history and habits of the Platte river as it was then known, what, in your opinion, was then the best and safest character of structure to be erected across Platte river in that place? *Answer.* I should think a pile and stringer bridge was sufficient for all requirements, for the passage of ice and water, and any other obstruction, and also for the requirements of the traffic. *Q.* In the construction of a pile and stringer bridge, what is the practical limit of the length of a span? *A.* About twenty feet. *Q.* What is the result if a longer span than twenty feet be admitted in a pile and stringer bridge? *A.* It would have to be trussed. You could not get timber long enough to carry the weight. *Q.* What is the difference in the use between a twenty or twenty-four—what is the objection to a large span as to safety or stiffness? *A.* The objection to a longer span is the shock that the rolling train gives—a wave motion—to it, which is bad for longer timber. *Q.* Can a pile and stringer bridge, practical therefore, be constructed with greater spans than twenty feet? *A.* Not with safety, for a railroad bridge. *Q.* If longer spans be adopted, what is the character and sort of bridge? *A.* A truss bridge. *Q.* Which, between a truss bridge and a pile and stringer bridge—having reference to the safety in its use, and of general requirements of railroad traffic—which is the better sort of bridge? (Objected to as incompetent, immaterial; overruled; exception.) *A.* For wooden structures I think the pile and stringer bridge the safest. *Q.* What is the general character of the Platte river as to the permanency of its channel—that is, as to the permanency of its channel in a given place? *A.* It is not permanent; it is movable. *Q.* What was its character at Valley in 1886, as to the establishment of its channel at a given place? *A.* There was no permanent channel; it was always shifting. *Q.* Does the fact that the channel is a shifting one, that is, moving from place to place, within its banks, have any effect in determining the character of bridge to be erected there—as to whether it should be a truss bridge or pile and stringer? *A.* Taking the Platte river and

its characteristics, with the channel as wide, and no defined channel, I prefer a stringer bridge to a truss bridge. If it was a place where the channel was defined in one place, you might generally build a truss bridge for the flow of ice to pass through."

We copy the following from the cross-examination: "*Question.* Now, I understand you to say that you regarded a pile and stringer bridge a safer structure than a truss bridge. Wherein is it a safer bridge for the passage of traffic? *Answer.* It is easier constructed, and it is safer on account of derailment. On account of derailment we generally have guards along on the outside of the bridge, and the car may cross the bridge and get off; but with the truss bridge, if a car got a little to one side, it might strike the truss and knock it down. Q. If a car should run off from the track while crossing the bridge, and you had the truss up, it would be likely to strike against the truss, and knock it out of place? A. Yes, sir; and knock some of its members out. Q. If you did not have the truss there, would it not be likely to go into the river? A. It might go, but we have out guards on the side for protection. Q. How high guards? A. We use six by eight timbers. Q. That is so the wheels would not run off? A. Yes, sir. Q. These guards are not put outside the iron rails? A. Yes, sir; and sometimes the inside had guards too. Q. They are placed how far from the iron rail? A. About a foot or eighteen inches. Q. That is, so that if the car got off, the wheels would not run over, and get off the bridge? A. That is mostly the object; yes, sir. Q. Could you not have that guard on a truss bridge just the same? A. We do it on truss bridges just the same. Q. Then, if you do it on a truss bridge, and that guard keeps the car from going outside of it, then it would not strike the truss, would it? A. The top of the car gets slued around so it is very apt to knock the truss. I have known them to knock down truss bridges that way, and I have known them to go across trestle bridges that way. . . . Q. Truss bridges have been in use by railroads, have they not? A. Yes, sir. Q. They are in use still to-day, are they not? A. Yes, sir. Q. Constantly being used? A. Yes, sir. Q. Are they not regarded as practicable? A. Yes, sir. Q. And were regarded before 1876 as practicable, were they not? A. Yes, sir." This must serve to indicate what, to some extent, was the contention of the parties in the trial to the jury.

Court's instructions.

Defendant asked, and the court gave, a number of instructions, one of which we here copy. It is as follows: "(5) You are instructed that, in order to entitle the plaintiff to recover in this case, he must have satisfied you by a preponderance of proof, not only that the defendant's bridge and approaches caused the overflow and damage complained of, but also that in the construction of the same the defendant was guilty of some actual wrong or negligence, but for which the obstruction

would not have existed, nor the overflow resulted. The defendant had a right to construct the bridge and the approaches across the river at the point named, although in so doing the river was necessarily obstructed to such an extent as to cause gorges and overflow, and, in the absence of negligence or want of ordinary skill in so doing, it cannot be held to have done a wrongful or negligent act. In the erection of its bridge, the defendant was bound to have, first, a special regard for the permanence and safety of the same as a means for the transportation of persons and property over its line of road; and if, in the exercise of its discretion, the defendant chose to erect this bridge, which is known as a 'pile and stringer bridge,' instead of a bridge of some other kind, as, for instance, a truss bridge, in the belief, with such means of knowledge and in the light of such engineering skill as was then obtainable, that the former, more nearly than the latter, complied with those conditions, then it was guilty of no wrong or negligence in this respect, although the latter description of bridge, on account of greater length of spans, might have permitted a freer flow and passage of ice and water, and might therefore have been less likely to contribute to an overflow of plaintiff's land than the bridge actually built; and under such circumstances the defendant would not be liable, even if it committed an error of judgment in this regard, and if it should now appear that the bridge actually built is not superior, in the respect named, to the truss or some other kind of a bridge." We think a fair analysis of this instruction may be said to be that to entitle plaintiff to recover he must satisfy the jury by a preponderance of evidence, not only that the structure caused the overflow, but also that in the construction of the same defendant was guilty of some actual wrong or negligence, but for which the obstruction would never have existed. The defendant had the right to construct the bridge and approaches, although in so doing the river was necessarily obstructed to such an extent as to cause a gorge and overflow, and, in the absence of negligence or want of ordinary skill in so doing, it could not have been held to have done a wrongful act. That it was bound to have, first, an especial regard for the permanence and safety of the structure as a means for the transportation of persons and property over its line of road; and if, in the exercise of its discretion, the defendant chose to erect a pile and stringer bridge, instead of some other kind, as, for instance, a truss bridge, in the belief, with such means of knowledge and in the light of such engineering skill as was then attainable, that the former, more nearly than the latter, complied with these conditions, then it was guilty of no wrong or negligence in this respect, although another form of bridge, on account of its greater length of spans, might have permitted a freer flow of ice and water, and have been

**Instruction
analyzed.**

less likely to cause or contribute to an overflow of plaintiff's land, etc. In other words, that defendant's first duty in constructing the bridge was to have regard to the permanence and safety of the same as a means of transportation of persons and property over its line of road; and then, if, in the exercise of its discretion as to the character or quality of bridge to be constructed, it should select one which would impede the flow of water and ice to a greater extent than one of another character or quality, even though it might have proven as safe, the defendant would not be liable for this error of judgment. We not only think this instruction

Duty of company in construction of bridge. fails to state the law correctly, but that it states it incorrectly. In *Omaha & R. V. R. Co. v. Brown*, 14 Neb. 170, 11 Am. and Eng. R. R. Cas. 501, a case quite similar to this, and growing out of the construction of the same bridge, Judge COBB, in writing the opinion of the court, says: "It was the duty of the railway company, in planning and constructing its bridge, to bring to their execution the engineering knowledge and skill ordinarily practiced in such works, and to see to the practical application of such knowledge and skill to the work in hand; among other things, so as to allow of the passage of the water and ice such as is known to pass in the stream annually, or which may reasonably be expected to occur occasionally, without regard to sudden overflows, as all are often designated as acts of God." This rule of law was adhered to in the same case in 16 Neb. 166; 20 Am. and Eng. R. R. Cas. 286, by Judge MAXWELL, and by Chief Justice COBB, at page 168.

In *Brown v. Cayuga & S. R. Co.*, 12 N. Y. 486, a case involving principles somewhat like the one at bar, Judge JOHNSON, in delivering the opinion of the court, says: "This" (the legislative authority conferred upon the road to construct the bridge, which is substantially the same as section 86, c. 16, Comp. St.) "confers upon the company authority to cross a stream with their road; but it would be a great stretch upon the language, and an unwarrantable imputation upon the wisdom and justice of the legislature, to hold that it imports an authority to cross a stream in such a manner as to be the cause of injury to others owning adjoining property. They were bound, in crossing the stream with their road, by the same obligation which would have bound a private owner of the land and stream, had he bridged it." As we understand the rule of law, as applicable to the case at bar, the defendant had the right to construct its bridge at the place selected, and in such construction it was bound to so build as to have regard for the permanency and safety of the bridge as a means of transportation of persons and property over its line, and also to construct its bridge as to avoid injury to adjacent property holders. If one class of bridges was permanent and safe, and its construc-

tion would necessarily impede the flow of water and ice, such as is known or reasonably to be expected to pass in the stream, and another class would be safe, and would not impede the flow of water and ice to the injury of such adjacent property holders, the latter class should be selected. In short, the duty of a railroad company in the construction of a bridge over such a stream as the Platte river would be both to the travelling and shipping public and to the land owners near by; neither could be sacrificed to the other; both should be equally protected. This instruction falls far short of stating this rule. But it is insisted that, even though it be open to the criticism made, yet, taking the whole of the instructions together, the law is correctly stated, as the instructions given by the court upon its own motion were correct, and have not been assailed. This would do, were it not that the instruction assumes to state a rule of law applicable to the whole case, and which might be decisive of it, and not a statement of a portion of the law which is completed in other instructions. The rule of law adopted by this court is plain and unequivocal, that, if an instruction misstates the law, another instruction correctly stated will not cure the evil, for the reason that the court cannot say which instruction the jury will follow. *Wasson v. Palmer*, 13 Neb. 378; *McPherson v. Wiswell*, 19 Neb. 177; *Ballard v. State*, 16 Neb. 610. Upon this question we are cited by defendant in error to *Sioux City & P. R. Co. v. Finlayson*, 16 Neb. 578, 18 Am. & Eng. R. R. Cas. 68. The instruction objected to in that case was that, before plaintiff could recover, he must prove certain facts which were the principal and essential facts in the case, though not all, perhaps. But the court did not say that if those facts were proven a recovery could be had. Hence it was permissible to supplement the instruction with others until the whole law upon that part of the case was stated. The instruction in this case involves quite a different principle. Here the jury are told that, in order to entitle plaintiff to recover, he must satisfy them of certain facts, and "under such circumstances the defendant would not be liable even if it committed an error of judgment," etc. This, as we have seen, was not a partial statement of the law, as in the case cited, but a misstatement, as in the case of *Wasson v. Palmer*.

At the time of the gorge and overflow of the river upon plaintiff's farm, he had a number of cattle, some of which were fat, and ready for market, but, as he stated in his cross-examination, the market was very low at that time, and he did not see proper to sell the cattle for the prices which could then be obtained. It appears from his testimony that his feed-yards were not far from the river; that he had 145 head of beef cattle; and that upon the overflow of his feed-yards he removed them to

Damages—
Killing
cattle—
Contributory
negligence.

another place, where they became partially surrounded by the water, so that they could not be fed and cared for as before, and that they thereby diminished in value. The court instructed the jury upon this part of the evidence as follows: "(16) If you find that plaintiff's fat or beef cattle were in reasonably good and proper condition for market at the time of the overflow, then it was his duty to market said cattle, or such of them as were in condition to market, provided he could with reasonable expenditure of labor and money have marketed them, and the defendant in that case would not be liable for subsequent loss or depreciation in the value thereof." The giving of this instruction is assigned for error. It was, no doubt, suggested by the well-established rule that, where a loss is impending, it is the duty of the person upon whom the loss may fall to exercise care in order that the injury may not be unnecessarily increased, and perhaps, upon the suggestion of contributory negligence on the part of plaintiff in not selling the cattle, and realizing as much out of them as the market would afford. We doubt this instruction being correct, when applied to this kind of a case. Plaintiff had the right to select his own time in which to sell. Had he placed the cattle upon the market at that time, in consequence of the overflow, we know of no rule by which he could recover whatever damage he might have sustained by selling upon a poor market, had the market become better. It was his duty to take such care of his stock as would make the loss as light as possible, perhaps, upon whoever it might fall. But it cannot be said that it was his duty to place his cattle upon a poor market, when, in his judgment, the market would be better in a short time. He had a right to exercise his own judgment and discretion in that matter; but he would have no right to allow his cattle to depreciate, starve, be drowned, or perish from any other cause which he could have avoided. This, we think, is the full extent of the rule. In our opinion, the instructions should not have been given.

An additional motion for a new trial was filed by plaintiff, alleging various grounds therefor, but which it is not deemed necessary to notice at length.

There are some affidavits produced which tend to show misconduct on the part of some of the jurors, and that some person, whose name need not be here given, sought and solicited other persons to interfere with the deliberations of the jury, and by criminal means, perhaps, prevent a verdict from being rendered in favor of plaintiff. While the trial court should make a special effort to protect the purity of jury trials by the infliction of heavy penalties upon persons who would even make an effort to contaminate verdicts by bribery or other improper means, and, if necessary, grant a new trial, yet there is no direct proof that defendant was a party to any transaction detailed in the affidavits,

and there is positive testimony that defendant's council who conducted the trial, and whose integrity is unimpeachable, knew nothing of what was alleged to have occurred. It is therefore deemed unnecessary to examine the question further.

The judgment of the district court will be reversed, and the cause remanded for further proceedings.

The other judges concur.

Construction and Sufficiency of Bridges.—See note, 14 Am. & Eng. R. R. Cas. 271; Gulf, C. & S. F. R. Co. v. Pool, 34 Ib. 187.

Sufficiency of Culvert.—Where it is shown that in times of high water the surface waters of a creek left its banks at a point above a culvert, and then for a short distance flowed over the adjoining lands, but that the same was forced, by the embankment of a railroad, back into the creek again above a culvert, such waters are not surface waters, but must, in determining the sufficiency of the culvert, be regarded in the same light as if they had continuously flowed in the creek. *Moore v. Chicago B. & Q. R. Co.*, (Iowa), 39 N. W. Rep. 390.

Flooding Lands—Damages.—Where lands which have been overflowed, are injured by the deposit of sand thereon, evidence of the cost of removing the sand is admissible. *Trinity & Sabine R. Co. v. Schofield* (Tex.), 10 S. W. Rep. 575. Where crops have been destroyed by an overflow before they had matured, evidence of what that character of crop was worth at or near the place where it was growing when matured, is admissible. *Gulf, Colorado & Santa Fe R. Co. v. McGowan* (Tex.), 11 S. W. Rep. 236.

Same—Evidence of Negligence.—Where the claim for damages is based upon an overflow of lands caused by the negligent construction of the defendant's railroad, evidence that after the overflow the defendant enlarged and reconstructed its culverts is not admissible for the purpose of showing negligence. *Gulf, Colorado & Santa Fe R. Co. v. McGowan* (Tex.), 11 S. W. Rep. 236.

EMERY, *Et Ux.*

v.

RALEIGH AND GASTON R. CO.

(102 N. Car. 209.)

Culverts—Construction—Sufficiency—Duty of Company.—It is the duty of a railroad company to so construct its culverts that they will carry off the water of the streams over which they are built under all ordinary circumstances likely to occur in the usual course of nature, including such heavy rains as are ordinarily expected, although of only occasional occurrence. But it is not liable for damages resulting from its culverts being insufficient to carry off the overflow caused by extraordinary and unusual rainfalls.

Same—Evidence—Reputation of Engineer.—The reputation for intelligence and skill of a civil engineer, under whose direction a culvert was built, cannot be shown in evidence on the trial of an issue as to whether the culvert was in fact so constructed as to carry off the water except in cases of excessive rainfalls.

Same—Expert Testimony—Rebuttal.—Where the issue was as to whether a culvert was of proper size, and the defendant railroad company examined as its witness an expert, who stated that he built the culvert, and it was the largest one

he had ever built: *Held*, that it was proper to permit the plaintiff to show that another corporation had built a larger culvert over the same stream a short distance below the culvert in controversy.

Same—Flooding—Contributory Negligence—Use of Lands Subject to Overflow.—Where the owner of a track of land had his brickyard on the premises, and his crops submerged with water by reason of the negligent construction of a railroad culvert, he is not guilty of contributory negligence when he afterwards constructs a brickyard in the same place and plants a crop on the same land, both of which are again submerged from the same cause. Because a culvert was negligently constructed by a railroad company, and plaintiff knew it, is no reason why plaintiff should have abandoned his land and ceased all effort to utilize it.

Same—Damages—Estoppel—Condemnation of Right of Way.—Proceedings for the condemnation of land for the right of way of a railroad company will not operate as an estoppel in an action brought by a party to such proceedings to recover damages to his lands resulting from the negligent construction of a culvert by the company.

Same—Requisition of Easement—Extent of User.—The right to have and maintain a culvert, so constructed as to cause plaintiff's land to be overflowed, can be acquired by a railroad company by proof of twenty years' user. But the user must have been such as to have subjected the company to an action at any time during the twenty years, and it must be shown that the overflow has, at regular or irregular intervals during the twenty years, covered the very land in controversy.

This is a civil action, tried before GRAVES, J., at May term, 1888, of the superior court of Halifax county.

There was a verdict for plaintiff, and the defendant appealed to the supreme court.

The pleadings were as follows, omitting immaterial portions of them:

The plaintiff, complaining of the defendant, alleges:

"1. That the defendant is a corporation, duly chartered and organized under an act of the General Assembly of North Carolina, passed at its session in 18 , and acts amendatory thereof.

"2. That the plaintiff Emma J. intermarried with Thos. L. Emery many years prior to the year 1884.

"3. That the *feme* plaintiff is the owner of, and, for some years prior to 1884, has been the owner of a valuable farm, adjacent to the town of Weldon, and lying upon Chockeyotte creek, and upon the upper or south side of the roadbed of the defendant, which said farm is commonly known as the 'Model Farm.'

"4. That the defendant's track passes over said Chockeyotte creek, and the defendant, more than three years prior to the beginning of this action, negligently constructed a culvert under its said track for the passage of the waters of said creek, which they have maintained ever since, to the great nuisance of the plaintiff.

"5. That in times of freshets or excessive rains, the said culvert is entirely too small for the free passage of the waters of

said creek, so that the said stream becomes dammed and choked up, and the waters thereof are ponded back upon the plaintiff's land, to its great injury and diminished productiveness for purposes of agriculture.

"7. That in the fall or late summer of 1885, the said defendant wrongfully and negligently, by means of its said culvert as aforesaid, caused the waters of said creek to pond back upon plaintiff's land and brickyard situated thereon, and destroyed 175,000 brick, the property of the plaintiff, standing thereon, worth five dollars per thousand, and accumulated clay and *debris* upon the said brickyard of the plaintiff, to her damage one thousand and seventy-five dollars.

"8. That about May or June, 1887, the said defendant wrongfully and negligently, by reason of its said culvert as aforesaid, caused the waters of said creek to pond back upon the plaintiff's land and brickyard situated thereon, and destroyed 75,000 brick situated thereon, the property of plaintiff, worth five dollars per thousand, and accumulated clay and *debris* upon said yard, to her damage four hundred and seventy-five dollars, and destroyed the plaintiff's crop growing upon said land, to her further damage nine hundred dollars.

"9. That, about the last of October or first of November, 1887, the said defendant negligently and wrongfully caused the water of said creek to pond back upon the plaintiff's land and brickyard as aforesaid, by means of said culvert, and destroyed 15,000 brick, the property of plaintiff, standing upon said yard, which said brick were worth five dollars per thousand, and accumulated clay and *debris* thereon, to the plaintiff's damage one hundred and twenty-five dollars.

"10. That the annual damage to the plaintiff's crops of grass, oats, corn, etc., has been five hundred dollars per year for the past three years.

"Wherefore, the plaintiff prays judgment for four thousand dollars damages and costs."

The defendant, answering the complaint herein, says:

"1. That sections 1 and 2 are admitted.

"2. That section 3 is admitted, with the following modification, *i. e.*, that the farm of the plaintiff, known as the 'Model Farm,' does not abut on or touch the roadbed or right of way of the defendant.

"3. That section 4 is denied as therein charged, and in answer thereto, the defendant says, that more than twenty years before the commencement of the plaintiff's action, the defendant caused to be constructed over the said creek, by skilful engineers, and with the utmost care, the said culvert as a part of its roadbed and track, which it was duly and legally authorized to do; and this defendant is informed and believes, and so avers, that the

said culvert in no way obstructs or impedes the natural flow of the water in and along said creek, but, on the contrary, the capacity of said culvert exceeds many times the capacity of the channel of said creek; and this defendant denies that it has unlawfully, negligently or wilfully erected, or maintained any nuisance to the plaintiff by the construction of said culvert.

"4. That section 5 of the complaint is not true, and is denied, and, further answering said section, this defendant says that the culvert of the defendant exceeds many times the natural capacity of said creek, and that the overflow of the plaintiff's said land is caused by the negligence of the plaintiff in not removing obstructions from and near the bed of said creek, so as to allow a free discharge of the surplus waters thereof, all of which said obstructions are above the defendant's culvert and right of way.

"5. That section 7 of the complaint is not true, and is denied, and, as a further answer thereto, this defendant says, that prior to placing their brickyard on said 'Model Farm,' the plaintiffs well knew that said yard was subject to overflow, both from the Roanoke river and said creek, in times of freshets therein, and the defendant alleges that the plaintiffs were guilty of contributory negligence in placing their said brickyard on said farm.

"6. That section 8 of the complaint is not true, and is denied, and, further answering said section, this defendant says that the damages to said plaintiff's brickyard and bricks was caused by the contributory negligence of plaintiff, as set out in section 5 of this answer; and that as to the alleged damages of the plaintiff's growing crops, if any, this defendant alleges the same was caused by the negligence of the plaintiff in not causing his said land to be properly drained, and in not removing obstructions to the flow of the water in said creek.

"7. That section 9 of the complaint is not true, and is denied, and, for further answer thereto, this defendant adopts the next two preceding sections of this answer as an answer thereto.

"8. That section 10 of the complaint is not true, and is denied, and, for further answer thereto, defendant alleges that the alleged damage to plaintiff's crop, if any, was caused by the negligence of the plaintiff, as hereinbefore set out and pleaded."

And for a further defence to the plaintiff's said action, this defendant says:

"That the alleged damages charged in complaint, if any, were the result of unusual and excessive rain, which no care, caution or foresight of the defendant could have prevented, and the defendant alleges that it was guilty of no negligence or want of due care in the construction and maintenance of its said culvert; and for a further defence this defendant says that more than twenty years before the commencement of this action, it erected its said culvert of its present dimensions, and has been in the

peaceable and undisturbed possession and maintenance thereof since then up to the bringing of this action, and that the then owner of the plaintiff's land assented and agreed to the building of said culvert."

Wherefore, defendant asks judgment, that he go without day, and for his costs.

The plaintiff, by leave of the court, amends his complaint by striking out, in section 5, line 2, the word "excessive," and inserting in lieu thereof the word "heavy."

The plaintiff offered issues numbered one and two, and the defendant offered issues numbered three and four. The issues thus submitted were approved by the court and submitted to the jury. After the charge, and before the jury retired, the court directed issue number four to be divided, and the issues submitted were as follows:

"1. Has the defendant negligently ponded water back upon the plaintiff's land?

"2. If so, what damage has plaintiff sustained thereby?

"3. Have the plaintiffs been guilty of contributory negligence?

"4. How long has defendant been using the culvert in its present condition?

"5. And has the user given the defendant an easement in the lands of plaintiff?"

Defendant excepted.

The defendant asked that this issue be submitted to the jury:

"What was the depth of rainfall on 10th May, 1887? Was the rainfall of 10th May, 1887, excessive and extraordinary?"

This was refused, and the defendant excepted.

The defendant asked to have this issue submitted to the jury:

"What damages did plaintiff sustain by the ponding back of the water on that occasion?"—meaning 10th May, 1887.

The court declined to submit this issue, and defendant excepted.

There was much evidence offered on both sides, and it seems material to set out a good deal of it in order to point out the several exceptions made. The complainant, T. L. Emery testified: "My wife owns and had owned the land known as the 'Model Farm' fourteen years at the time of bringing this suit. That the tract of land did not adjoin the railroad track of defendant, but lies to the south of the road, on Chockeyotte creek, above the culvert. The culvert at the base is sixteen feet wide. The stream just above the culvert is 26 feet wide. The length of the embankment is more than one hundred feet or more. Close to the culvert, below, the creek is 25 or 26 feet wide, and then it widens out and deepens, being 36 feet wide. Seemed to be 8 or 9 feet deep. We measured from water's edge when low,

12 inches above low water, spreads out a hundred or two feet. There is eddy or back water within a foot or two of lower edge of culvert. I noticed that the water rushes through and had undermined the culvert, so that some of the large stones of which it was built have cracked."

The plaintiff then offered to prove that some 200 yards below, on the same stream, the Roanoke Navigation company had constructed a culvert before defendant, which is 26 feet wide, but upon objection, this testimony was then excluded.

The witness then testified that, in time of heavy rains, when the creek is swollen, the water is ponded back on the land; that much of the land is rich, alluvial land—that it is not all low bottom; that on the land is clay suitable for making bricks; that he had made a brickyard; that in the fall of 1885, he had been damaged by the ponding back of water on the land—that his crop was injured, and he had lost 175,000 unburnt, sun-dried brick, which had been packed under shelter; the water did not go over top of the stack, but came up to the lower part, and the brick softened and mashed, and others came down and were softened and mashed down in the same way; brick worth \$5 per thousand; at that time the water was ten or twelve feet higher above the culvert than it was below.

That in May, 1887, the water was ponded back over his land; land rich, partly in clover, partly in oats, and partly in other crops; the witness testified as to the damage to the crop, but as to that it is not deemed material to set out the particulars. At this time witness had about 75,000 bricks destroyed at same place and in same manner as in 1885.

Again, in October, 1887, about the time of the fair, water ponded back again; destroyed 15,000 brick. For agriculture for 1885 and 1886, damages \$400 to \$500 per year. The water was ponded back at almost every rain by the culvert. The land was well ditched. Any ordinary size rain would pond it back on the farm. It takes a larger rain than ordinary to pond it back on the brick-yard.

On the cross-examination of witness he said, there is a mill-dam below the culvert, I do not know how high, which has been there eight or ten years. The rain in May, 1887, was a big rain, but I do not know that it was extraordinary. Culvert is higher 25 to 30 feet. No freshet in river when my brick were destroyed. In reply to question, as to why did you not make your brickyard out of reach of the water after your bricks were destroyed the first time, witness said, "The brickyard had cost me a great deal, and I took the risk," and afterwards said it was the only suitable place for making brick. I have omitted much of the details in regard to damages to brick, etc., not deemed material.

By consent, defendant was allowed to introduce, out of the

regular order, the witness P. B. Hawkins, who testified: "I built the culvert in 1859; I was contractor for the work; Bodwell, a civil engineer, had direction of the construction."

The defendant offered to show by witness the reputation of Bodwell as an intelligent and expert engineer.

Plaintiff objects. Objection sustained.

Exception by defendant.

Witness qualified himself as an expert, and further testified:

"I think the culvert sufficiently large for the size of the stream; I thought it sufficient to carry off any rise: largest culvert I ever built."

Upon cross-examination, witness said:

"If the jury find, as a fact, the water was ponded back ten or twelve feet higher above the culvert than below, it would not be sufficient."

T. A. Clark, a witness introduced by defendant, testified:

"That, under the authority of the War Department, he had kept a record of rainfall in Weldon for past seventeen years; that on the 10th day of May, 1887, 6 63-100 inches of rain fell; fell from 9 A.M. to midnight; this was an extraordinary fall of rain; no such rain has fallen since I have kept record."

The plaintiff was permitted, after objection by defendant, to ask the witness Clark, "If ponding back or accumulating water on the 'Model Farm,' in the spring or summer time, tended to injure health?"

Objection overruled. Exception by defendant.

Witness answered: "It would depend upon how long water staid; if it became stagnant, it would."

Defendant objected to answer. Overruled. Defendant excepts.

The plaintiff proposed to show that the culvert below was larger. Defendant objects.

Court being of opinion that defendant had opened the door, by the examination of the witness Hawkins, allowed witness to testify.

Dr. O'Brien, a medical expert, introduced by the defendant, was asked by the plaintiff:

"If the jury believe, in time of large rain, large quantities of water are ponded back on Emery's Model Farm, on which the vegetation is rank, what would be the effect upon health?"

Defendant objects. Overruled. Exception by defendant.

Witness answered: "Rank vegetation would be killed by water and exposure to sun; in the summer time would produce malaria."

Objection to answer by defendant. Overruled. Exception by defendant.

The defendant prayed the following instructions:

"1. If the jury shall believe that in May, 1887, a rainfall of over six inches fell, said fall of rain excessive and extraordinary, and if

the jury shall believe that damage was sustained thereby, that the defendant is not liable therefor."

Refused, except as hereinafter set out in charge. Defendant excepts.

"2. That if the jury shall believe that the plaintiff knew, or had cause to know, at the time he placed the brick at the place he did, that it was subject to overflow, then it was contributory negligence, and they will answer the issue, Yes."

Refused, except as hereinafter set out in charge. Defendant excepts.

"3. That if the plaintiff knew at the time he planted his crops on the Model Farm, that it was subject to overflow, then he has contributed to the damage, and the jury will find issue, 'Yes.'"

Refused, except as is hereinafter set out in the charge. Defendant excepts.

"4. That if the defendant has used its culvert as it now is since 1857, then the law presumes it has a grant to do so, and the plaintiff cannot recover."

Refused, except as is hereinafter set out in the charge. Defendant excepts.

The defendant also asks this instruction :

"That there is no evidence that the maintenance of the culvert by the defendant in its present condition is a public nuisance," which was given by the court :

The court then instructed the jury as follows :

"The first issue is, has the defendant negligently ponded water back upon the plaintiff's land ?

"The burden rests upon the plaintiff to satisfy you, by a preponderance of the testimony—*i. e.*, by the greater decree of credence raised in your minds. Now, what is the truth of this matter? No question is made about the building of the railroad and the construction of the culvert, for the defendant admits so much. The defendant says that, although it had constructed the culvert, it was built in such manner and with such care that injury to the plaintiff was not to have been anticipated. It was the duty of the defendant to have constructed its culvert so that it would carry off the water of the stream under all ordinary circumstances, and the usual course of nature, even to the extent of such heavy rains as are ordinarily expected, unless it has the right of grant, actual or presumed, to make it smaller. If the defendant so constructed the culvert that it was not sufficient to carry off the water of the stream under ordinary circumstances (and by ordinary circumstances is meant the usual rainfall), even if such heavy rains are occasional; and if by reason of the insufficient culvert the plaintiff's land was overflowed, the answer to the first issue should be 'Yes,' unless the defendant had acquired the right to pond water on the plaintiff's land. As to whether the defendant

had such right, I will instruct you when I come to speak of the fourth issue.

"On the other hand, if the jury shall believe that the plaintiff's land was flooded from the creek and not by back water from the culvert, then it was done by the negligence of the defendant, and the issue should be answered 'No.' And if the jury shall believe that the mill dam below the culvert obstructed the full flow of the water, so that it did not flow freely through the culvert, as it would have otherwise done, and that if it had not been for the mill dam the water would not have ponded back on the plaintiff's land, then your answer should be 'No,' for the defendant is not responsible for the overflow caused by the mill dam. It can be only responsible for its own act, not for the acts of others.

"If the jury shall believe that the culvert is sufficient to carry off all the water having a natural outlet by the creek, except in cases of extraordinary and unusual rainfall, then defendant was not negligent, and if the overflow was the result of extraordinary rainfall, the answer should be 'No.' But whether there was overflow of plaintiff's land, whether such overflow was caused by heavy rains, such as are not unusual, and the obstructed flow of the water by the culvert, or whether the culvert was sufficient to carry off the water under ordinary circumstances, or whether the overflow was all the result of extraordinary rainfall, are questions for you to say.

"Perhaps it may be proper for me to say that if you find the first issue 'No,' that is an end of the case. But if you should answer 'Yes,' then it becomes material to consider and determine other issues.

"I shall next call your attention to the fourth issue. (N. B.—This issue was afterwards divided, and constitutes the fourth and fifth issues as found in the record.)

"The fourth issue is compound. The first question presented is as to how long the defendant has been using the culvert in its present condition. This is merely a question of fact, upon which I can give you very little assistance. You must determine it upon the evidence.

"The second part of the issue is, 'and had the user given the defendant an easement on the land of the plaintiff?'

"It is insisted by the defendant that, having used the culvert for more than twenty years before the plaintiff began his action, that it has acquired a right, not only to use it for its own purposes, but to use it, although it may have the effect of ponding back water on the land of the plaintiff. It is true that a right to pond water upon the land of another may be acquired by actually ponding it back and keeping it so ponded back for twenty years. It is not necessary that it should be kept continually

ponded to the same height, when the difference is made by low water in time of drought or for repairs; as in case of a mill pond, if a dam is erected and kept up, and the water is ponded back for twenty years, the owner of the mill acquires an easement to pond the water back over the land covered by the mill pond, when as full as usual, although it may have been taken down for repairs, and although it may occur that by reason of drought or by reason of defects in the dam itself, temporarily the water may have been part of the time lower. The defendant assumes the burden of proof, when it undertakes to show its right to pond water back on the land of plaintiff, and it must show it by a preponderance of evidence."

Exception by defendant.

"If the jury is satisfied that the defendant has for twenty years ponded water back on the land of plaintiff in such a way as to expose itself to action for such ponding for twenty years before this suit was begun, then the defendant has acquired a right to pond the water back on the plaintiff's land."

Exception by defendant.

"In determining this question of easement and fixing the time of the twenty years, the jury must count out the time from 20th May, 1861, to the 1st January, 1870.

"In fixing the beginning, the jury must find the time that defendant's claim began—the time its right was first asserted by an actual ponding back upon the lands now claimed by the plaintiff.

"It makes no difference whether the land was then owned by the plaintiff, or by those under whom she claims.

"[In order to acquire a right by prescription, the user must have been continuously asserted and enjoyed without interruption for twenty years; and if the ponding back of water on the land of plaintiff was at long intervals, such occasional trespasses could not ripen into title.]"

Defendant excepts to portion of charge in brackets.

On the subject of contributory negligence, his Honor instructed the jury that if the circumstances were such that a man of ordinary prudence would have planted his crops and put his bricks on the land, then the plaintiff was not negligent. If the defendant had a right by prescription to pond back the water (if he did pond it back), then the plaintiff would be guilty of negligence in placing his bricks or planting his crops on the land, and the jury should answer the third issue "Yes." But if defendant had no right to pond back the water (if it did pond it back), and a man of ordinary prudence would have so planted his crops and placed his bricks, then the plaintiff was not guilty of negligence in so planting his crops and placing his bricks on the land. Defendant excepted. His Honor also further charged the jury, that the meas-

ure of damages was the actual injury sustained by plaintiff's crops and brick.

Verdict for plaintiff, as before stated.

Defendant moved for a new trial:

"1. For admission of improper testimony.

"2. For failure to instruct as requested.

"3. For error alleged in charge given."

Then defendant moved for judgment upon the verdict. Motion overruled.

This cause coming on to be heard, and having been tried by the jury upon the following issues:

"1. Has the defendant negligently ponded water back upon the plaintiff's land?

"2. If so, what damage has plaintiff sustained thereby?

"3. Have the plaintiffs been guilty of contributory negligence?

"4. How long has defendant been using the culvert in its present condition?

"5. And has the user given the defendant an easement in the lands of the plaintiff?"

And the jury having answered the first issue "Yes;" the second issue, "\$1,870;" the third issue, "No;" the fourth issue, "Since it was built, with the exception of the cracks, August, 1857," and the fifth issue, "No."

"It is now, on motion of R. O. Burton, Jr., plaintiff's attorney, adjudged that the plaintiff recover of the defendant the sum of one thousand eight hundred and seventy dollars, with interest from the first day of this term until paid, and the costs of this action, to be taxed by the clerk."

From this judgment the defendant appeals to the supreme court.

Mr. R. O. Burton for the plaintiff.

Mr. H. W. Day for the defendant.

AVERY, J. (after stating the facts.)—The action was brought to recover damage for injury done to plaintiff's brickyard in the year 1885, and again in May, 1887, and to his crops, by overflows caused by the defective construction of a culvert over a creek on the defendant's line.

The first and second exceptions present the question, whether his Honor erred in refusing to submit two additional issues tendered by defendant's counsel. It was not the design in adopting the new procedure, that parties should be bound by rules so technical as those which governed the old system of pleading. The forms of action being disregarded, and it being requisite only, under the Code, to allege the material facts in the complaint, and to admit or deny the allegations in the answer, ordinarily it must be left to the sound discretion of the *nisi prius* judge to deter-

mine, when required or allowed to settle the issues, whether the action can be tried more intelligently and satisfactorily by the jury upon specific issues submitted for the purpose of eliciting distinct findings in the nature of a special verdict, or by confining the enquiry, in imitation of the old method, to a single issue, or a small number of issues, and pointing out, by instruction, how the conflicting evidence, controverted in the pleadings and on trial, though not involved in the terms of the issues submitted, bears upon the verdict to be rendered in response to them, provided, always, that the issues submitted are raised by the pleadings.

It is misleading to embody in one issue two propositions, as to which the jury might give different responses, and on exception taken in apt time, a new trial will in such cases be granted. The facts found by a jury, whether comprehended under one or many issues, must be sufficient to enable the court to proceed to judgment. When the judgment can be predicated upon the findings, though it may appear that the judge who tried the case below refused to submit more specific issues tendered by a party, yet, if he told the jury how the testimony relating to the issues refused should be considered in connection with the law, in passing upon those submitted, and thereby gave opportunity to enter exception to the instruction given, and to the refusal to give that asked, the appellate court will not grant a new trial. The court will impose no limit to the exercise of discretion on the part of the judge below, in settling the issues, except that the facts established by the responses to them shall constitute a lawful basis for the judgment, and that an appellant was not denied an opportunity to have the law applicable to any material portion of the testimony fairly presented and passed upon by the jury, through the medium of some issue.

The defendant contends that there was error in declining to submit to the jury the two issues offered:

"1. What was the depth of rainfall on 10th of May, 1887? Was the rainfall 10th of May excessive and extraordinary?"

"2. What damage did plaintiff sustain by ponding back of the water on that occasion?"

His Honor presented the whole question of negligence on the part of the defendant in the first of the five issues, to which the jury responded, and which is in the following language:

"Has the defendant negligently ponded water back upon the plaintiff's land?"

The judge instructed the jury upon the question of negligence on defendant's part as follows:

"It was the duty of defendant to have constructed its culvert so it would carry off the water of the stream under all ordinary circumstances and the usual course of nature, even to the extent of such heavy rains as are ordinarily expected, unless it has the

right of grant, actual or presumed, to make it smaller. If the defendant so constructed the culvert that it was not sufficient to carry of the water of the stream under ordinary circumstances (and by ordinary circumstances is meant the usual rainfall), even if such heavy rains are occasional, and by reason of insufficient culvert the plaintiff's land was overflowed, the answer to the first issue should be 'Yes,' unless the defendant had acquired the right to pond water on the plaintiff's land."

We think his honor stated the law correctly, and is sustained by the case of *Wright v. Wilmington*, 92 N. C., 156, and the authorities there cited; also *Wood on Railways*, vol. 2, § 253, p. 873.

By applying the law, as stated by the court, the jury would naturally determine, from the testimony, whether the rainfall of the 10th of May, 1887, or that in the year 1885, was so extraordinary and excessive that it could not have been reasonably expected to fall, and if such was the character of the rain at either date, they would naturally leave out any injury sustained by such a rain-fall, in making their estimate of the damage; or if they found that all the damage sustained by the plaintiff, both in his brick-yard and as to his crops, was attributable to extraordinary rains, they would of course respond "No" to the issue. His Honor, in addition to the language quoted from his charge, told the jury that the defendant was "not negligent, if the overflow was the result of extraordinary and unusual rainfall." The defendant introduced a witness, P. B. Hawkins, who testified that he built the culvert in 1859, was contractor for the work, and that one Bodwell, a civil engineer, had direction of the construction.

The defendant offered to show by the witness Hawkins "the reputation of Bodwell as an intelligent and expert engineer." On objection by the plaintiff, the testimony was held to be incompetent, and the defendant excepted. Counsel on the argument in this court did not abandon this exception, but failed to cite any authority in support of it; and we cannot see how the fact that the engineer, who had the oversight of the construction of the culvert, was an intelligent and expert engineer, tends to show that the culvert was in fact so constructed as to carry off any but an excessive fall of rain.

The plaintiff had, before the introduction of the witness P. B. Hawkins, "offered to prove, as tending to show negligence, that, some two hundred yards below, on the same stream, the Roanoke Navigation Company had constructed a culvert before defendant, which was twenty-six feet wide," but upon objection by defendant the testimony was then excluded. The witness Hawkins, having qualified himself to speak as an expert, said: "I think the culvert a sufficiently large culvert for the size of the stream. I

thought it sufficient to carry off any rise. It was the largest culvert I ever built." Subsequently, the court, being of opinion that the defendant, by the examination of Hawkins, had "opened the door" and made the evidence previously excluded competent, allowed a witness to testify, after objection on the part of the defendant, that the culvert built by the Roanoke Navigation Company, two hundred yards below, on the same stream, was larger than that built by Hawkins, and this is the ground of another exception relied on by the defendant. We concur with his Honor in his ruling. Hawkins had qualified as an expert, as we may fairly infer from the record, in part, at least, showing his experience as a contractor for work on railways, and at any rate he had been allowed, after stating that he had built that particular culvert, to testify further that it was the largest he had ever built, the natural inference being that he had constructed a number, and this was of unusual capacity. In order to break the force of this testimony, it was competent for the plaintiff to show that another had been built so near below that the volume of water in the stream would not probably be materially increased before reaching it, or certainly to show that another and larger one was very near, and in that way to meet the argument (which defendant's counsel might make to the jury) that an expert and experienced engineer had never constructed one that would allow so much water to pass. Hawkins might have been asked, on cross-examination, with a view to impeach him or destroy the weight of his testimony as an expert, what the dimensions of the lower culvert were. *Greenleaf on Ev.*, vol. 1, § 468. But we think that the testimony of Hawkins tended to show that the defendant had not done the work in a negligent or unskilful manner, by impressing the jury with the idea that no larger culvert had ever been constructed, because an educated and intelligent contractor had not, in the years of experience that made him an expert, built one so large. This is only a fair inference from the testimony, and it would follow that testimony as to the location and capacity of the lower culvert must of necessity tend to remove the incorrect impression made by Hawkins' testimony, and in that way bear directly upon the question of negligence involved in the first issue.

The testimony offered to prove that the stagnant water engendered malaria and caused sickness, was withdrawn from the jury, and the exception growing out of its introduction was not insisted on in this court.

Counsel for the defendant contends that there was error in the refusal to give the instruction prayed for in reference to contributory negligence, and in giving that substituted by his Honor for it. Indeed, in the argument in this court counsel went further and cited a number of authorities to establish the position that

this is a case in which, upon the undisputed facts, the jury should have been told there was contributory negligence on the part of the plaintiff.

The plaintiff, T. L. Emery, testified that in the fall of 1885 his brickyard was overflowed, and in May, 1887, it was again submerged, and that the plaintiff suffered great damage, on both occasions, in the destruction of brick.

In reply to a question, he stated, as a reason why he again made brick at the same place, after the overflow in 1885, that the preparation of the brickyard had cost him a good deal of money, and that the place selected was the only place suitable for making brick on the land.

It is insisted that there was a want of ordinary care shown by plaintiff in manufacturing brick a second time in a place that had been overflowed nearly two years before.

If the jury had not found that there was negligence on the part of the defendant in response to the first issue, then, under the instruction of his Honor, it would have been unnecessary to proceed to consider the third, which involved the question of contributory negligence. So, we may assume that the jury agreed upon the affirmative answer to the first issue, before discussing the third.

We cannot, upon reason or authority, reach the conclusion that the plaintiff exhibited a want of ordinary care by manufacturing brick in the year 1887, because the brickyard had been damaged in 1885, nor that he was negligent in planting another crop in the latter year on land that had been overflowed two years before, for the reason that the defendant company, by the careless and unskilful construction of its road, in the failure to provide adequately for the escape of the water of the creek, even when there was no extraordinary volume, had subjected the plaintiff to some risk in raising the usual crops on the farm, or attempting to utilize the only suitable place for manufacturing brick on that tract of land. It is often difficult to determine when the admitted evidence in a case crosses the shadowy line, and compels the court to take the case from the jury, and declare as the law, that contributory negligence has been proven. The application of the rule, that when the facts are ascertained, the question, whether there has been negligence or contributory negligence, is one addressed exclusively to the court, is attended with difficulty, because it seldom happens that the material facts in any two cases are precisely the same. When there is any conflict in the testimony the courts will lay down the rules of law and define the standard of care necessary; but leave the jury to decide, whether, under the circumstances, ordinary care was exercised by a defendant.

The defendant has no reason to complain that the court allowed

the jury to apply, as the test, the abstract principle that the plaintiffs were bound to exercise that degree, and only that degree of care, which a man of ordinary prudence would exhibit in the management of his affairs, and refuse to sustain the unreasonable proposition that a prudent man must either allow his land to remain uncultivated, and his brickyard, with his investment for manufacturing, to be abandoned, or incur the risk of losing the fruits of his labor, because he had some reason to fear that, by the negligent construction of a culvert, the crop or the brick might be injured or destroyed. Wood on Railway Law, sec. 300, and notes.

The authorities cited by defendant do not sustain the position, either that the court erred in refusing to give the instruction asked, or in the failure to go further in that given, and tell the jury that the admitted facts were sufficient proof of contributory negligence. The authority to which council refers us is not applicable to the facts of this case. Beach on Contributory Negligence, secs. 12 and 13.

The same author says, section 162: "It is for the court to say, in a majority of instances, what is and what is not negligence, as an abstract proposition. When, therefore, the facts of a given case are undisputed, and the inferences or conclusions to be drawn from the facts indisputable—when the standard of duty is fixed and defined so that a failure to attain it is negligence beyond a cavil, then contributory negligence is matter of law. When the facts are unchallenged, and are such that reasonable minds could draw no other inference or conclusion from them than that the plaintiff was or was not at fault; it is the province of the court to determine the question of contributory negligence as one of law." He cites Field on Damages, p. 519, to the effect that, to "justify a nonsuit on the ground of contributory negligence, the evidence against the plaintiff should be so clear as to leave no room for doubt, and all material facts must be conceded, or established beyond controversy." The learned author concludes that, "in a majority of cases, the question of the plaintiff's negligence will be one of fact, to be ultimately determined by a jury."

In *Detroit R. R. Co. v. Von Steinborg* (cited by the author), Judge COOLEY says: "The case must be a very clear one, which would justify the court in taking upon itself this responsibility." . . . Speaking of the finding by the court that there was contributory negligence in any given case, the learned judge says further: "He thus makes his own opinion of what would be generally regarded as prudence a definite rule of law. It is quite possible that if the same question of prudence were submitted to a jury, collected from the different occupations of society, and, perhaps, better competent to judge of the common opinion, he might find them differing with him as to the ordinary standard of proper care."

The last exception grows out of the refusal to give the instruction asked, that "if the defendant has used its culvert, as it now is, since 1859, then the law presumes it has a grant to do so, and the plaintiff cannot recover." The injury resulting from the unskilful construction of culverts cannot be estimated as a part of the damage for right of way, and the grant from the land owner or the proceeding for condemnation, to which he and the corporations were parties, would not operate as an estoppel in an action brought by him for injury caused by the unskilful construction of culverts and consequent damage to land located beyond the right of way. The owner of adjacent land can, of course, resort to common law remedy for damage sustained by him in the overflow of his land, directly consequent upon such carelessness on the part of a railroad company in the construction. Wood on Railway Law, sec. 253, vol. 2, p. 876. His recovery can be defeated only by proof of a prescriptive right, acquired by user, to maintain the culvert in its present state, with the consequent injury. The right by prescription could be acquired by the defendant by user for twenty years, and the user, in order to raise the presumption of a grant from the quiet enjoyment of the easement, must have been such as to have subjected the claimant to an action any time for twenty years before his right to the easement was controverted by the bringing of this action. The defendant must show, too, in order to establish his right to the easement, "that the user, at the time when the action was brought, was not substantially in excess of that which he had exercised during the period requisite to the right." *Sherlock v. Railway Co.*, *infra*. To apply that rule to this case, the burden is on the defendant to show, not that the overflow has constantly extended over a fixed territory on the plaintiff's land or varied only with the water work for twenty years, but that at regular or irregular intervals the water has overflowed the very land on which the bricks were destroyed or the crops injured, and to the very same extent, so as to have made the defendant liable in an action for or in the nature of trespass, by the *feme* plaintiff and those under whom she claims, at any time during that period.

The floods occurring at intervals must have always covered the land on which the crops were raised, or the bricks were made, in order to establish an easement that would prove available as a defence to the one ground of action or the other. Wood on Lim. of Actions, § 182, p. 377; *Sherlock v. Louisville N. A. & C. R. Co.*, 115 Ind. 22.

The defendant has not attempted to establish the prescriptive right, by offering any testimony to show that the land has been overflowed. So far as we can judge from the report of the evidence, which does not purport to be full, there was no proof offered as to the nature or extent of the overflow, except that

offered by plaintiff in support of his demand for damage, and covering only three years prior to the bringing of the action. The proof by the plaintiff, that ordinary rains, for four years prior to the bringing of the action, had been sufficient to cause the overflow of the brickyard and the cultivated land of the *feme* plaintiff, does not supply the omission of the defendant company, or relieve it of the burden. It does not follow that the overflow has been uniform, so as to subject the company to an action in favor of those under whom she claims, for the previous time, extending back twenty years; for changes in the system of drainage by land owners above, and the clearing of lands, might have increased the volume of water in the creek and caused it to overflow more readily. But such alterations would not have relieved the defendant company of liability resulting directly from the insufficiency of its culverts to discharge the water. No such testimony having been offered by the defendant, the complaint, that his Honor left the jury to pass upon the question whether an easement had been acquired, ought not to come from it.

We concluded, therefore, that there was no error, and the judgment must be affirmed.

BELL'S EXECUTORS

v.

NORFOLK AND SOUTHERN R. CO.

(*North Carolina Supreme Court, October 8, 1888.*)

Eminent Domain—Surface Water—Drainage.—By the condemnation of lands, a railroad company acquires, as a necessary incident to its title, the right to cut ditches therein for the purpose of protecting its roadbed against surface waters, and to discharge the water from such ditches into a ditch belonging to the proprietor, a part of whose land is taken; and if the adjoining lands are injured by reason of the insufficiency of the ditch therein to carry off the increased flow of surface waters, it is *damnum absque injuria*, and the proprietor cannot recover.

APPEAL from Superior Court, Currituck County.

Action to recover damages for wrongfully flooding the plaintiff's lands. The plaintiff appeals from a judgment for the defendant.

Grandy & Rydlett for plaintiff.

Pruden & Vann and *Starke & Martin* for defendant.

DAVIS, J.—Civil action, originally commenced by the testator

of plaintiffs to recover damages alleged to have been caused by the flooding of his land by the act of the defendant company in constructing its roadbed, tried before MONTGOMERY, J., at spring term, 1888, of Currituck superior court. **Facts.**

By consent, the issue, "What damage the plaintiff sustained?" was submitted to a jury, and as to all other issues and facts a jury trial was waived, and it was agreed that they might be passed upon by the court. The response to the issue submitted to the jury was "\$700," and the court found the following facts, to wit: The plaintiff's testator owned the land and lead ditch described in the complaint. The defendant, in locating and constructing its roadbed, cut across said ditch, and also cut ditches by the side of its roadbed, to get dirt for the roadbed, and also to drain the roadbed. In constructing its roadbed, the defendant cut across the embankment or dirt on the side of the lead ditch. By means of the locating and constructing of said roadbed more water was drained into plaintiff's ditch than it could carry off, and the plaintiff's land was flooded, and injured thereby. The water thus carried by the defendant's ditches was surface water, except occasionally, after heavy rains, the water from the Dismal swamp would spread out over the surface from the ditch. There was no artificial or natural drain for these waters. The "lead ditch" was sufficient to drain plaintiff's land, till defendant constructed its road. The lands of plaintiffs, over which the defendant constructed its roadbed and ditches, and also a section or a part of the lead ditch, had been condemned by regular proceedings under the statute, and damages for the land was taken, and the legal incidental damages to the lands not taken had been assessed and paid to him by the defendant. The defendant did not locate and construct its roadbed, or dig any ditch, outside or off of the lands which had been condemned and paid for. The ditches cut by the defendant were necessary for the purpose of the roadbed for the road, and for the safety of travel over the road; and the roadbed could not have been drained in any other way. The plaintiff could have obviated the difficulty, or relieved his land of this increased volume of water, drained into his lead ditch, by cutting the same deeper. The plaintiffs, upon the above facts and issue, moved for judgment for \$700 and costs. The court refused the motion, and, upon defendant's motion, granted judgment for defendant. The plaintiffs excepted, and from the rulings and judgment appealed to the supreme court.

There is no error. It is found as a fact that the ditches of which the plaintiffs complain were necessary for the purposes of the roadbed; that the roadbed could not have been drained in any other way; and that they were not outside or off of the land which had been condemned and paid for by the defendant, including "the legal incidental damages to the lands not taken."

Every one has the right properly to use his own; and without this drainage for the surface water, the defendant's right of way, for which the plaintiffs had been paid, would have been of no value; and if, as an incidental consequence of the lawful and rightful use of its easement by the defendant company, the surface water damages the lands of the plaintiff's testator, it is *damnum absque injuria*, and for which he cannot recover as for a tort. Raleigh, etc. R. Co. v. Wicker, 74 N. C. 220. It is no infringement of the maxim, "*sic utere tuo ut alienum non lædas*." Washb. Easem. 455. It was said in Willey v. Norfolk S. R. Co., 98 N. C. 263, speaking of the condemnation of the right of way: "Everything necessary and incident to the original making and subsequent operating the road must be intended to have passed as against the owner of the condemned land," and the right to cut such ditches on the condemned land, as will protect the roadbed against accumulating surface water, is a necessary incident. The water drained by the defendant's ditches was all surface water, except occasionally, after heavy rains, the water from the Dismal swamp would spread over the surface of the ditch. There was no natural or artificial drain to the Dismal swamp, and the ditches were not designed to drain it, and the overflow was none the less of surface water, which, we apprehend, could not have been caused or prevented by the ditches. In Raleigh, etc. R. Co. v. Wicker, *supra*, a distinction is taken between diverting or obstructing a natural or artificial drainway and one by which surface water is drained. In the latter, in measuring the compensation to the land-owner, the resulting damage should be estimated; and this was one of "the legal incidental damages" which had been assessed and paid for, as found by the court. In the former, it is the duty of the company, in constructing its roadbed, to provide for the discharge of the water through its accustomed drainway, whether natural or artificial.

No error.

Obstruction of Surface Waters.—See Philadelphia W. & B. R. Co. v. Davis, 34 Am. & Eng. R. R. Cas. 143, and note 148.

TEN EYCK

v.

PONTIAC, OXFORD AND PORT AUSTIN R. CO.

(Michigan Supreme Court, February 15, 1889.)

Action for Services—Evidence—Competency.—An action was brought against a railroad company to recover for services rendered. The plaintiff had been engaged in obtaining a loan for an investment company. The defendant sought to prove that the investment company was the real owner of the railroad and that the plaintiff was estopped by his representations to it, from making any claims for his services. *Held*, that as the investment company was not a party to the action, the evidence was inadmissible.

Board of Directors—Proceedings—Parol Evidence.—The proceedings of the board of directors of a private corporation may be shown by parol testimony when no record thereof is kept.

Director—Services as Attorney—Implied Agreement.—Where a railroad company contracts with a director for his services as attorney and also in procuring aid notes, right of way, etc., services so rendered are not embraced in the ordinary duties of a director of the company, and there arises an implied agreement that the company shall pay what they are reasonably worth.

ERROR to Circuit Court, Oakland County.

Action of *assumpsit* by Junius Ten Eyck against the Pontiac, Oxford & Port Austin R. Co., for services rendered by the plaintiff. The defendant brings error to review a verdict and judgment for the plaintiff.

Aug. C. Baldwin for appellant.

Griffin, Warner, Hunt & Berry for appellee.

CHAMPLIN, J.—The plaintiff is, and for many years past has been, an attorney at law, residing in the city of Pontiac, and he brought this action against defendant to recover for expenses paid, and services performed, as agent and **Facts.** attorney of the defendant company in securing the right of way for its road, and for obtaining aid notes, raising money, securing loans, and making contracts for the construction of its road, covering a period from September, 1881, to November, 1883. The project originally was to construct a railroad from Oxford to Port Austin, a distance of 84 miles, and a corporation was formed for that purpose on the 23d of July, 1879, with a capital of \$672,000, and seven directors. Each director subscribed to 120 shares of \$100 each, and plaintiff was one of the directors. Nothing was done under this organization. Two days later the stockholders signed amended articles of association, by which they extended the southern terminus from Oxford to the

city of Pontiac, and changed the name of the corporation to the "Pontiac, Oxford & Port Austin Railroad Company." The capital stock was increased to \$800,000, and the number of directors to eight. The articles were again amended, on the 24th of September, 1881, by increasing the capital stock to \$1,500,000, and changing the termini so as to extend it from Pontiac to Caseville. The plaintiff continued a stockholder and director in the corporation until 1884. On December 5, 1881, plaintiff was re-elected attorney for defendant company. Previous to this, and in the same year, he was employed by the board of directors to go to New York to negotiate a loan and obtain a contract for the construction of the road. These services were successfully performed, and a contract was entered into between defendant and an investment company, bearing date November 12, 1881. On the 20th day of December, 1881, the following resolution was passed by the board of directors: "At a meeting of the board of directors held at Oxford, county of Oakland, State of Michigan, on the 20th of December, A.D. 1881, pursuant to call of the president, the following proceedings were had, a full quorum being present: On motion, J. Ten Eyck was duly appointed to attend to the obtaining of the right of way along the whole line, and to collect in the notes given along the line in aid of the railroad. The meeting then adjourned. JUNIUS TEN EYCK, Secretary." The plaintiff's counsel was permitted to prove, by oral testimony of the directors, that all of the eight directors were present at the meeting, and voted for the motion, excepting himself. Plaintiff also offered in evidence from the records kept by the corporation the following resolution, passed at a meeting of the board of directors on the 29th of May, 1882, viz.: "Resolved that the sum of \$5,000 per year be paid J. Ten Eyck for his services as attorney and solicitor of this company for and during the two years last passed." The record shows a quorum present. The plaintiff was also permitted to show by parol that all of the directors were present at the meeting, and each, excepting himself, voted for the resolution. The claims for expenses paid out in the services of defendant were not seriously disputed or resisted at the trial. Testimony was given showing that nearly the entire time of plaintiff was consumed in the service of the company, and his practice as a lawyer was almost entirely given up, clients turned away, and that his services for the company were worth \$5,000 annually. The jury returned a verdict for the plaintiff. The errors complained of may all be

Assignments of errors. summarized under three heads: (1) The court erred in excluding from the jury all testimony relative to the investment company, and the rights acquired and now held by them from the railroad company. (2) In permitting parol evidence to be given of the action of the board of directors

in the absence of any record of such action, and in adding to what was shown by the record as to what number of directors were at the meeting of the board, and that they all voted for the motion and resolution, except Ten Eyck, who did not vote. (3) That, being a director of the company, he could not be employed and paid for performing services for the company as attorney or otherwise, and especially would such action be illegal when applied to services already performed.

As to the first point, the error is based upon the fact, which defendant desired to show, that the investment company that built the road are the owners in fact of all the stock, property and franchises of the Pontiac, Oxford & Port Austin Railroad Company, and the corporation exists only in name, for the purpose of maintaining the franchises of a corporation for the investment company's benefit, and that the claim set up is unjust and inequitable as to such investment company, and, if established, would seriously affect their rights and property. We think the court did not err in excluding this testimony. The investment company is not a party to this suit, and the issues sought to be raised cannot be properly tried in this action. If plaintiff's position as a director, and what he has done and represented to the investment company, estops him from asserting any claim against the corporation, such estoppel cannot be set up as a defence in an action at law against the corporation by it or the investment company.

Exclusion of evidence relative to investment company.

No notice is taken in the brief of the plaintiff of the second point, and merely a passing notice in the brief of defendant, and no authority is cited in support of the proposition. What is resolved upon at a meeting of a board of directors of a private corporation may be proven by the record of the proceedings of the board, if one is kept and the proceedings entered, but if a record is not kept, or the proceedings are not recorded, parol evidence is admissible to show what was resolved upon, and by what vote it was carried. *Novelty Works v. Macalister*, 40 Mich. 84. The rule is different with respect to municipal corporations, when the law requires records of their official action to be kept. *Stevenson v. Bay City*, 26 Mich. 44; *Hall v. People*, 21 Mich. 456.

Parol evidence of proceedings of board of directors.

The third point relied upon is one upon which there is an apparent conflict of authority. The directors of a corporation are its agents. The entire management of corporate affairs is committed to their charge, upon the trust and confidence that they shall be cared for and managed within the limits of the powers conferred by law upon the corporation, and for the common benefit of the stockholders. They are required to act in the utmost

good faith, and in accepting the office they impliedly undertake to give to the enterprise the benefit of their best care and judgment, and exercise the powers conferred solely in the interest of the corporation. They have no right to represent the corporation, in any transaction in which they are personally interested, in obtaining an advantage at the expense of the company they represent.

Extra services performed by directors— *Compensation.* 1 Mor. Priv. Corp. § 517. But the rule is not an arbitrary one. It is founded on reason, and should not be applied without regard to the circumstances of the case. Although it has been held by some courts that a director cannot enter into a valid contract with the corporation of which he is agent, although the corporation is represented in the transaction by a majority of the board, yet the decided weight of authority and of reason supports the doctrine that such a contract would be valid. Id. § 527, and cases cited in note 3. It is not necessary to the binding action of a board of directors that each member should take part in its deliberations. The general rule is that a majority of the members of the board constitute a quorum for the transaction of business, and a majority of the quorum have power to bind the corporation by their vote. It does not necessarily follow that there is impropriety in a member of the board entering into contract relations with the corporation represented by the other members of the board. There may be cases where there may be manifest propriety in doing so. Suppose the line of a railroad is laid across land owned by one of the directors may he not enter into a contract to sell a right of way to the corporation? Suppose a director is possessed of superior knowledge, skill, or ability to serve the corporation in matters not strictly within the line of his duty as a director, may it not contract with him for his services?

It is true that contracts entered into between agents of the corporation occupying positions of trust and confidence and a corporation will always be scrutinized with jealous care by courts, to see that no advantage is taken of the corporation or the rights and interests of its stockholders jeopardized, but it cannot be said that contracts fairly entered into, and honestly executed, where no one is defrauded or overreached, are invalid. In this case the circumstances are free from suspicion. The corporation contracted with him for his services as attorney, and also in procuring aid notes, rights of way, and working up an interest in the construction of the road in the communities through which it was projected, in order to secure aid in its construction by donations and subscriptions, and also in enlisting capitalists in the enterprise. These were services which were not embraced in the ordinary duties of a director of the company. They were valuable to the corporation, and were such as to which they had a

right to agree upon the compensation to be paid; and if his services were engaged for the above purposes, and they were performed, there arose an implied agreement that they should pay what such services were reasonably worth, and this the plaintiff proved upon the trial. The principle laid down in the line of authorities cited by the learned counsel for defendant has not been followed in this state; but the contrary doctrine was asserted in *Niles v. Muzzy*, 33 Mich. 61, which is in consonance with the views above expressed. Had the board of directors engaged any other person to perform the services rendered by the plaintiff, no question could have been made about their liability to pay therefor. The services were performed by the plaintiff at the request of the board of directors, and the law implies a promise to pay what they are reasonably worth, so far as they have not been fixed by the resolution of the board. *Detroit v. Redfield*, 19 Mich. 383. The plaintiff introduced testimony tending to show that his services were reasonably worth at the rate of \$5,000 a year for the entire time claimed by him. There is another consideration which leads to the same conclusion in this case. During the time for which the plaintiff claims pay for services, the members of the board of directors were the only stockholders in the corporation. The resolution and motion above referred to as appearing in the records of the corporation had not only the sanction of the board of directors, but of each individual stockholder of the corporation. They could not be heard to complain as stockholders of their own action as directors, and none of them have complained.

We are all of opinion that there is no error in the record, and that the judgment should be affirmed.

SHERWOOD, C. J., did not sit. The other justices concurred.

Directors—Compensation for Extra Services.—It is a general rule that directors performing services for a company outside the line of their official duties, are, when such services are performed by virtue of an express contract with the company, entitled to compensation therefor under an implied agreement although no remuneration should be specified in the contract. *Lafayette, B. & M. R. Co. v. Cheeney*, 87 Ill. 446; s. c., 68 Ill. 570; *Shackelford v. New Orleans R. Co.*, 37 Miss. 202; *Citizens' National Bank v. Elliott*, 55 Iowa 104; *First Nat. Bank v. Drake*, 29 Kan. 211; *Santa Clara Mining Ass'n v. Meredith*, 49 Md. 389; *New York & N. H. R. Co. v. Ketchum*, 27 Conn. 170; *Hall v. Vermont & M. R. Co.*, 28 Vt. 401. But in Alabama it has been held, that a bank director who has performed extra services as an agent of the bank, could not lawfully claim compensation therefor. *Godbold v. Branch Bank*, 11 Ala. 191.

It has accordingly been held that a director of a railway company is entitled to compensation for services in procuring the right of way and soliciting subscriptions. *Lafayette, B. & M. R. Co. v. Cheeney*, 87 Ill. 446; s. c., 68 Ill. 570. But see *New York & N. H. R. Co. v. Ketchum*, 27 Conn. 170. But he is not entitled to claim compensation for services performed as a member of the executive counsel of the board of directors, nor in contracting for the construction of the road, these services being part of his duties as director. *Cheeney v.*

Lafayette, B. & M. R. Co., 68 Ill. 570. The appointment of a director of a railroad company as treasurer does not in the absence of any provision for compensation for services rendered in that capacity, entitle him to remuneration. *Holder v. Lafayette, B. & M. R. Co.*, 71 Ill. 106. Where a director, who had rendered services for a corporation outside of the line of his duties, continued to hold office for a period of eight years after rendering such services and made no claim during that time, the court refused to enforce the implied promise to pay. *Utica Insurance Co. v. Bloodgood*, 4 Wend. (N. Y.) 652.

Employment of Attorney.—Where the general manager of a railroad company retains a practicing attorney to attend to the legal business for the company, the company is liable for the services of the attorney, unless the general manager had no authority to make the employment, and the attorney knew, or might have known, by using ordinary diligence, that he had no such authority. *St. Louis, Fort Scott & Wichita R. Co. v. Grove* (Kan.), 18 Pac. Rep. 958.

Apparent Authority of Agent.—Two railroad companies of the same name were incorporated in Georgia and Florida respectively. In an action against the Florida company to recover the price of certain cross ties, etc., the defendant sought to prove that the contract was made with the agents of the Georgia company and not with defendant. The court *held*, that if the agents of the Florida company went over into Georgia, and went upon the right of way of the Georgia company and rented an office, and put upon the door of the office a sign board, styling it the office of the Georgia company, it being the terminus of the Georgia company, and gave no notice that they were the agents of the Florida company, the plaintiff had the right to treat them as agents of the Georgia company, and, if they made a contract with him, the Georgia company would be liable. *Florida Midland & Georgia R. Co. v. Varnedoe* (Ga.), 7 S. E. Rep. 129.

Adoption of Unauthorized Contract.—Where the agent of a railroad company makes a contract with a third person in his own name in such terms as to bind him individually, such contract cannot be ratified by the company or its agents, although the company may, by its actions, adopt it. *Florida Midland & Georgia R. Co. v. Varnedoe* (Ga.), 7 S. E. Rep. 129.

TERRE HAUTE AND INDIANAPOLIS R. CO.

v.

STOCKWELL.

(*Indiana Supreme Court, March 16, 1889.*)

Conductor—Employment of Physician—Ratification.—If a conductor places a man who has been injured by the train of which he has charge, in the care of a physician, and the company immediately thereafter acquires full knowledge of all the facts and circumstances of the physician's employment and permits him to go on and render services after it acquired such knowledge, it thereby becomes liable for the services rendered, it being its duty to notify the physician if it repudiates his employment.

Same—Extent of Employment.—The conductor of a railroad train testified that he employed a physician to dress the wounds of an injured person. The physician testified that the conductor informed him that he would leave the injured man in his care for treatment, and he was corroborated by two other witnesses. *Held*, that the evidence was sufficient to sustain a finding that the employment of the physician, which was subsequently ratified by the company, covered all services necessary and proper which the physician rendered until the

patient had become convalescent, and that the physician was not confined to a claim for dressing the injured person's wounds.

Evidence—Telegrams—Parol Testimony.—Where there is no evidence to show that certain telegrams were reduced by the sender to writing, parol testimony of the terms of the telegrams is admissible.

APPEAL from Circuit Court, Putnam County.

Action by George W. Stockwell against the Terre Haute & Indianapolis R. Co. to recover the value of certain professional services rendered by the plaintiff upon the defendant's employment. The defendant appeals from a verdict and judgment for the plaintiff.

John G. Williams for appellant.

S. A. Hays for appellee.

BERKSHIRE, J.—There are two errors assigned: (1) The court erred in overruling the demurrer to the complaint.

(2) The court erred in overruling the motion for a new trial. The complaint, in substance, alleges that in the year 1884, the appellant, by its employes, operating and running a locomotive engine and train of cars over its railroad track, through Reelsville, a station on the line of its railroad, then and there ran said locomotive engine against one William McCray, and then and there, and thereby, seriously injured him by then and there causing a compound comminuted fracture of both bones in the left forearm, etc.; that the injury was of a character so serious as to require immediate attention; that the said station is many miles distant from the principal offices of the appellant, and from the residences of its principal officers, and that John Trindle was the conductor in charge of said train, and, as the agent of the appellant, employed the appellee, who was a resident surgeon and physician at said station, to render professional services to the said McCray, and that he did, in accordance with said request and employment, render the said McCray surgical aid and attention from the ——— day of ———, 1884, to the ——— day of ———, 1885, and that his services and employment were made known to the company immediately after the accident, and it had full knowledge thereof; that the said services so rendered were of the value of \$300; that the said conductor was the highest representative of the appellant, and the superior officer present when the accident occurred and said employment made. A bill of particulars is filed with the complaint as a part of it.

Allegations in complaint.

We are of the opinion that the complaint stated a cause of action. It is not necessary that we determine whether or not, under the circumstances averred, the conductor, as the agent of the company, had authority by a single employment to bind the company for the services rendered. It is shown that the injury oc-

curred; that the conductor employed, as the agent of the company, the appellee to render the services; that when the services were

**Conductor
as agent—
Employ-
ment of
physician.**

rendered the appellant had full knowledge of all the facts; and that the appellee was never discharged by the appellant. We are of the opinion that, if the services were rendered under the employment, as stated, and with a full knowledge of all the facts at or about the time of the accident or employment, and that the appellant permitted the appellee to go on and render services after it had acquired such knowledge, it thereby became liable for the services rendered; that is to say, the company—having been informed of the accident, the employment of the appellee by its conductor, claiming to act as its agent; that the appellee was acting under the employment—if it did not intend to hold itself responsible for the services rendered, it became and was its duty to so notify the appellee, and its failure to do so was a ratification of the employment as made by the conductor. *Terre Haute & I. R. Co. v. McMurray*, 98 Ind. 358; *Toledo, W. & W. R. Co. v. Rodrigues*, 47 Ill. 188; *Toledo, W. & W. R. Co. v. Prince*, 50 Ill. 26; *Indianapolis & St. L. R. Co. v. Morris*, 67 Ill. 295; *Cairo & St. L. R. Co. v. Mahoney*, 82 Ill. 73.

The first reason for a new trial is that the verdict is not sustained by sufficient evidence. The second reason is that the verdict is contrary to law. We may consider the two reasons together. The evidence establishes the facts of the accident, the employment by the conductor; that he was the superior officer present when the accident occurred; and that the appellee rendered

**Same—
Ratifica-
tion of em-
ployment.**

the services sued for. The agent of the appellant at the station where the accident occurred testified that on the same day, and soon thereafter, the conductor came into the office and sent telegrams, both to the general superintendent and general agent of the company, that the train of which the conductor had charge had struck a man and broken one or two arms; and that he had left him in charge of Dr. Stockwell. The conductor testified to having sent the telegrams as stated by the agent, and, further, that when he arrived at St. Louis that evening he reported to the general superintendent that he had struck a man at Reelsville, and had employed a physician to dress his wounds. On the 28th day of April, 1885, the appellee addressed a letter to the president of the company, stating the circumstances of the employment, the services he had rendered in a general way, and demanding payment therefor. We must conclude that this letter was duly received, for the appellant produces and introduces it in evidence on the trial. There is no evidence tending to show that the appellant ever questioned or repudiated the employment as made by the conductor; not even after the receipt of the appel-

lee's letter. From the evidence the court trying the cause was fully justified in finding that the conductor's employment of the appellee to render the services was thereafter ratified and confirmed, and rendered the appellant liable.

The third reason for a new trial assigned is that the court erred in its assessment of the amount of damages, and the fourth reason is excess in damages assessed. It is contended that the employment extended only to the dressing of the wounds at the station, and that the after-services were not within the employment, and that the appellant is not liable therefor. We are not of this opinion. The appellee testified that the conductor informed him that he would leave McCray in his care for treatment. Two other witnesses testify that the conductor said to the appellee that he would leave McCray in his care. The conductor testified that he called for a physician, and that the appellee spoke up and stated that he was one, and that he said to the appellee that he should dress McCray's wounds, and send the bill to the general superintendent. It is our opinion that the court was authorized by the evidence in finding that the employment given to the appellee, and subsequently ratified, covered all services necessary and proper which the appellee might render until the patient had become convalescent. The letter of the appellee introduced in evidence fixed the value of the services at the same amount as found by the court. All the other evidence in the case on that subject placed the value much higher. We are therefore of the opinion that the appellant has no cause to complain of the amount of damages assessed.

**Damages—
Extent of
employ-
ment.**

The fifth and last reason for a new trial is that the court erred in admitting the evidence of the witness Ford as to the contents of the telegrams sent by the conductor. It is a well settled rule of evidence that parol evidence cannot be introduced of the contents of a written instrument until some excuse is shown for its absence.

**Telegrams—
Parol tes-
timony.**

The objection to the introduction of the evidence was that the loss or destruction of the telegrams was not shown. The difficulty standing in the way of this objection is that it nowhere appears that the telegrams were in writing. If the conductor did not reduce the telegrams to writing, but gave them verbally to the operator, then what he said to the latter was an oral communication, and susceptible of parol testimony. We know, as a matter of fact, that many telegrams are communicated and sent in the manner we have suggested, and we should not conclude that the telegrams in question were given to the operator who sent them in writing, without proof. If the point should be made that they were reduced to writing at the receiving office, the answer would be that the court could not find that out without

proof, for it is not impossible for both telegrams to have been delivered by word of mouth. The witness Ford does not testify that the telegrams were reduced to writing by the conductor. The evidence on that subject is: "The conductor of the train, John Trindle, came to the office, and sent a telegram. I don't think I have the telegram. I did not look for it, as I did not think it was necessary, as is the custom of the office, after a certain length of time, to destroy the telegrams, and I think this one was destroyed." The witness evidently has no recollection upon the subject, and simply gave his opinion and conclusion from what he knew to be the custom of his office in disposing of old telegrams. But there is a further reason why there is no available error in the admission of the testimony. The conductor testified that he gave the information conveyed by the telegrams to the general superintendent the same evening of the accident, after arriving at St. Louis. Therefore the appellant was not injured because of the admission of the evidence objected to.

We see no error in the record, and are of the opinion that the judgment should be affirmed.

Judgment affirmed, with costs.

COFFEY, J., took no part in the decision of this case.

MITCHELL, J., does not concur in this opinion so far as it seems to hold that the conductor could bind the railroad company by the employment of a physician without some express authority to that end.

Medical Services—Authority of Agent.—As to the liability of railroad companies for services rendered to injured persons upon the employment of the company's agents, see note, 11 Am. & Eng. R. R. Cas. 30; 1 Am. & Eng. Encyc. of L. 365.

CENTRAL RAILROAD AND BANKING CO. ET AL.

v.

CHEATHAM.

(*Alabama Supreme Court, July 17, 1888.*)

Reward—Offer—Obstructing Track—Ultra Vires.—An offer of a general standing reward for the detection of persons obstructing the track of a railroad company is not *ultra vires* of the corporation.

Same—Superintendent—Scope of Authority.—A railroad company having an implied power to offer a general reward for the detection of persons obstructing its road, such authority is incident to the business and duties of the superintendent and consequently is within the scope of his agency.

Same—Corporate Contract.—A circular was issued offering a reward for the

detection of persons obstructing the track of a certain railroad company. The circular was signed "A. B., Supt.," but at the head of it was prefixed the name of the company. *Held*, that the offer was the contract of the railroad company and not of the superintendent individually.

Same—Evidence—Competency.—A railroad company pleaded in defence of an action to recover a reward, that it was the contract of the superintendent individually. *Held*, that testimony to the effect that the plaintiff, in reply to a letter addressed to the superintendent, received by mail the printed circular enclosed in one of the business envelopes of the railroad company addressed in the handwriting of the superintendent's secretary, was admissible for the purpose of showing that the contract was made by the corporation and not by the superintendent as an individual.

Same—Knowledge of Company.—In an action to recover a reward offered by a railroad company, evidence that circulars offering the reward were posted at various public places on the line of the railroad by direction of an employee of the company who was under the control of the superintendent, and remained posted for about three months and until after the rendition of services, is admissible for the purpose of showing that the officers and agents were cognizant of the offer.

Same—Construction—Past and Future Offences.—An offer of a reward "for the arrest of any person or persons for the malicious obstructing of the tracks" of a railroad company, applies not only to future but also to past offences.

APPEAL from Montgomery City Court.

Action to recover the amount of a reward offered by the defendants for the arrest and conviction of persons maliciously obstructing the tracks of the defendant companies. The defendants appeal from a judgment for the plaintiff.

Arrington & Graham for appellants.

Rice & Wilcy for appellee.

CLOPTON, J.—In June, 1886, the appellee arrested three individuals for the offence of having maliciously obstructed the railroad of the Montgomery & Eufaula Railway Company.

One of them was discharged by the magistrate on the preliminary investigation. The other two were committed, subsequently indicted, and convicted. Thereupon appellee brought the suit to recover a reward claimed to have been offered by the appellants. The offer was by means of a printed circular, of which the following is a substantial copy: "Central Railroad & Banking Company of Georgia, Southwestern Railroad Division. Montgomery & Eufaula Railway Company of Alabama. \$300 reward for the arrest, with proof to convict, any person or persons, for the malicious obstructing of the tracks of these companies. THEO. D. KLINE, Supt." The offer, though general, being for the arrest of any persons committing the specified offence, may be regarded a promise conditional on doing the proposed acts, and by performance becomes a binding contract, not having been previously revoked. To entitle the plaintiff to recover, it was incumbent on him to prove, not merely the arrest, but also that he furnished proof to convict. The nature and sufficiency of the proof so furnished need not be circumstantially

Facts.

shown; it is sufficient if shown that he furnished the proof on which the conviction was had.

The material and important questions, on which the liability of the defendants depends, are raised by the objection to the admission in evidence of the circular. The objection involves the power of railroad corporations, and the authority of the superintendent, in the absence of express authority by the managing body, to offer such general rewards, the nature and extent of the offer, and the collateral rulings of the court on the admissibility of the evidence to show that the offer was made by the superintendent, and that it was adopted and ratified by the corporations. Without controverting the power of such corporations to offer rewards in special cases, it is contended that they have no implied power to offer a general standing reward. The argument is that, the state having enacted laws to protect their property, and being presumed capable of enforcing them, such implied power is unnecessary. The general principle will be conceded that a corporation can do no acts and make no contracts except such as are authorized by its charter or by the general law. All the powers, however, need not be conferred in express terms. There are implied powers incident to every private corporation; power to do such acts as are necessary or proper, directly or indirectly, to carry the express powers into effect, and to enable it to answer the purposes of its creation. Among the powers incidental to all private corporations is the authority to institute the established and appropriate legal proceedings for the enforcement of their rights and the protection of their property. It is of the highest importance and necessity that the tracks of railroad companies, employing the powerful agency of steam in the transportation of freight and passengers by day and by night, shall be kept free from obstructions, and that every reasonable precaution to secure safety should be used by the officers or agents to whom this duty is entrusted. For the purpose of affording protection, the statute declares that any person who wantonly or maliciously places any obstruction or impediment on a railroad shall be guilty of a felony. The enforcement of the criminal law is essential to the peace, good order, and security of the community. The institution of prosecutions against those who commit the offence of obstructing the railroad is a legitimate and proper means of protecting the property of such corporations. The power to institute such prosecutions is a necessary implication from the nature of their business and the necessities of their condition. The prosecution of persons accused of crime by citizens, whose rights have been specially offended, is encouraged in aid of the state authorities to bring them to justice, and the offer of rewards for the apprehension of perpetrators of felonies when unknown,

and of fugitives from justice when known, is the policy of the state. Code 1886, § 4746. There can be no question of the authority of the corporations to offer rewards and employ agents to detect and arrest violators of the criminal law enacted for their protection. On the ground of such authority is founded their responsibility for the wilful and malicious acts of such agents when done in executing the agency. Railroad companies ordinarily operate long lines, which render it impracticable to guard every section. Usually, obstructions are placed on the roadbeds under cover of secrecy, and the perpetrators are unknown. Prompt action is necessary to their detection. Delay after the commission of the offence renders the detection more difficult, and frequently defeats it altogether. A general reward tends to promote immediate and prompt vigilance and effort, is more efficient to prevent the commission of such offences, and is not inconsistent with any law or public policy, nor foreign to the objects of the corporation. A general standing reward may be offered by natural persons, and equally by corporations. *Ricord v. Central Pacific R. Co.*, 15 Nev. 167; *Express Co. v. Patterson*, 73 Ind. 430.

But, though the corporation may have such implied power, it is insisted that the superintendent has no authority to offer a general reward unless expressly granted by the board of directors. A corporation necessarily acts by representation, and the appointment of an agent includes power to do anything necessary and usual to execute the authority with effect. The scope and character of the business which he is empowered to transact is the measure of the authority of a general agent. The real authority of a superintendent is not restricted to such powers as may be conferred in terms by the board of directors, or the by-laws, or by the usages of the corporation, but also includes such powers as are incident to his general duty and express authority. To him is intrusted, as the representative of the corporation, the general management and supervision of the running and operation of the road, and it is his general duty to take care that it is kept in safe condition. In the discharge of his duty he may adopt any legitimate mode, and employ any means which are usually deemed effectual and proper to protect the road against obstructions. As we have shown that railroad corporations have the implied power to offer a general reward for the detection, apprehension, and bringing to justice of persons obstructing the road, such authority is incident to the business and duties of the superintendent, and to the purposes of his department; consequently within the scope of his agency. *Toledo, W. & W. R. Co. v. Rodrigues*, 47 Ill. 188.

Same—
Authority of
superin-
tendent.

The objection to the introduction in evidence of the circular is founded on the further ground that the offer of the reward is, on

its face, the personal obligation of the superintendent, and on the absence of evidence showing that it was intended to bind the defendants. The general rule undoubtedly is that when a contract is made by an agent in order to bind the principal, it should be made in his name and purport to be his contract. An exception to the general rule is, when an agent has incidental authority to make contracts in relation to his usual and general employment, both he and the principal may be personally responsible, though the contract may be made in the name of the agent, and that the true character of the transaction may be shown by parol evidence. *McTyer v. Steele*, 26 Ala. 487. It is true, no attempt was made to show, by extrinsic evidence, that the offer was intended to be the personal engagement of the defendants, and the mere affix of the abbreviation of superintendent to his signature does not, *prima facie*, impose a personal liability on them. But the form and manner of the signature are not conclusive. The offer itself furnishes its own interpretation. It purports by the heading to be made in the names of both defendants, and is in relation to and connected with their property and business. In such case, the signature of Kline as superintendent must be regarded as the signature of the corporations by him. In form and terms the offer is the joint and several contract of the defendants. *Collins v. Hammock*, 59 Ala. 448.

For the purpose of showing that the offer was made by Kline as superintendent, the plaintiff was allowed to prove, against the objection of the defendants, that he wrote a letter to Kline, without stating its contents, which was sent by mail, addressed to him at Macon, Ga., his place of residence and business. A few days thereafter he received by mail the printed circular, enclosed in an envelope, post-marked Macon, Ga., on which were printed the words, "Official Business, Office of Superintendent," and the names and description of defendants as they appear in the circular; and also that after the arrests, in an interview with Kline, the plaintiff stated that he wished one Mulloy, who was in the employ of one of the defendants, as a witness at the trial of the accused persons, who Kline promised should be present, and that he was present at two terms of the court. That Kline was superintendent of the southwestern division of the Central Railroad & Banking Company, and of the Montgomery & Eufaula Railway Company, which was part and parcel of the former, were admitted facts. His name, as affixed to the circular, was printed, which rendered the positive proof of his signature impracticable, and resort to circumstantial evidence compulsory. The printed circular having been sent by mail, in response to a letter directed to the superintendent, and in an official envelope

Admission of circular in evidence—Personal obligation of superintendent.

Proof of letter written to superintendent and reply.

addressed in the handwriting of his secretary, the presumption is, in the absence of rebutting evidence, that it was an official transaction. The facts and circumstances above stated were relevant and proper to be considered by the jury in determining the question whether the offer was made by the defendants through Kline as their superintendent.

When an act is done without authority, under an assumed agency, it is the duty of the principal, if he would avoid personal responsibility therefor, to disavow and repudiate it in a reasonable time after information of the transaction. *Mobile & M. R. Co. v. Jay*, 65 Ala. 113. It would be unjust to permit plaintiff to expend his time, labor, and skill in detecting, arresting, and procuring proof to convict on the faith of the offer of reward, and then allow defendants, if cognizant of the offer to disavow the obligation after receiving the benefits, under the pretence of want of authority. On the question of ratification, the facts that the circulars were posted at various public places on the line of the railroad, by direction of an employe of the defendants, who was under the control of the superintendent, and remained posted for about three months, and until after the rendition of the service, were proper to go to the jury, as tending to show that the officers or agents of defendants were cognizant of the offer. *Kelsey v. National Bank*, 69 Pa. St. 426. **Ratification by company.**

It is further insisted that the offer of the reward was prospective, and did not apply to the arrest, with proof to convict, of persons who had committed the offence previously to its date. While the offer may be largely preventive in its nature and purpose, prevention may be rendered as effectual by industrious efforts to bring to justice those who have already committed, as by causing the arrest and punishment of those who may thereafter commit the offence. The words, "for the malicious obstructing of the track of these companies," were used to designate the special offence, and were not intended to confine the reward to the commission of future, to the exclusion of past, offences. Its terms are broad enough to embrace both; but, if it should be limited to either, the reasonable construction would be in favor of its application to offences committed, and not solely anticipative of future commissions. We discover nothing in the terms of the offer which authorizes the construction contended for by appellants. The rulings and charges of the court are in accord with the foregoing principles. Affirmed. **Construction of offers—Past and future offences.**

When Reward Earned.—If proceedings against the criminals are dismissed at the request of the railway company, the company is liable for the reward, although it was offered for the apprehension and conviction of the guilty parties. *Louisville & N. R. Co. v. Goodnight*, 10 Bush (Ky.) 552.

*ARTUSY et al.**v.*

MISSOURI PACIFIC R. CO.

(Texas Supreme Court, March 1, 1889.)

Trespasser on Track—Contributory Negligence—Deafness.—An aged man with defective hearing was struck by a train whilst upon a railroad track, and was killed. His deafness was not known to those operating the train. The train was composed of about twenty cars in advance of the locomotive, and was moving slowly. The deceased was seen by the lookout upon the first car long before the train reached him, but it was supposed that when necessary for his safety he would leave the track. When the train was about 100 feet from him the lookout signalled to stop it, but before the cars could be stopped he was run over and fatally injured. *Held*, that the railroad company was not guilty of negligence and was not liable.

APPEAL from District Court, Harris County.

Action to recover damages for the wrongful killing of Charles Artusy, the husband and father of the plaintiffs. The plaintiffs appeal from a judgment for the defendant.

Brady & Ring for appellants.

Baker, Botts & Baker for appellee.

STAYTON, C. J.—This action was brought by appellants, the widow and minor children of Charles Artusy, to recover damages for an injury that resulted in his death. At the time

Facts.

Charles Artusy was injured he was walking on and along the track of the railway, on which he had travelled a half mile or more before he was struck by a moving car. He was an aged man, with defective hearing; but this was not known to the persons operating the train, so far as the record shows, and there was nothing in his appearance to indicate his inability to take care of himself. He was fully aware of the danger of walking on the track, which it seems he had been accustomed to do; and on the day of his injury, being advised against such a course by a niece from whose home he was returning to his home when injured, had promised her not to walk on the track. The place where he was injured was not in a street, but on private property of the railway company, over which, however, it was shown persons on foot frequently passed. There was nothing to prevent the seeing of approaching trains for a long distance from where he was injured in the direction from which the train came that injured him. The track on which he had travelled seems to have been in a street until it reached a point a short distance from where he was injured, and at or about the place

where that street ended it was traversed by another street, known as Nance street. It is claimed that the train was negligently made up, in that it consisted of about 20 cars in advance of the locomotive, and that this contributed to the injury. It is further contended that no signals of the approaching train were given, but as to this the evidence is conflicting. It is further contended that, although there was a person on the foremost car as a lookout, that he failed to discharge his duty, and could and ought to have seen the deceased in time to have stopped the cars before they reached him. There is evidence that the lookout did see him long before the train reached him, and supposed when necessary for his safety he would leave the track; fully expected he would do so when he reached Nance street; saw nothing to induce him to believe that he did not know of the approaching train, or would expose himself. It further appears that the train was moving slowly, and that when the lookout saw that deceased did not leave the road at Nance street, but continued to approach, the signal to stop the train was given. At that time deceased was as much as 100 feet from the train, if the evidence is to be believed, but before the cars could be stopped they came in contact with him. It is urged that the court, under this state of facts, erred in giving the following charges: "Second. That, if the proof satisfy you that Artusy, deceased, was walking on defendant's track, and did not use his ears or eyes in such a way as a man of ordinary sense and discretion should have done, and if defendant's servants in charge of the train did not have any reasonable grounds to believe that he would not get off the track in time to avoid being run over, and if such servants used all reasonable skill, care, and effort to stop the train, and avoid running against deceased, after it became manifest that deceased did not intend to get off the track, then your verdict should (if you so find the facts to be) be for the defendant. Third. On the other hand, if from the evidence you find that deceased was not negligent in walking on defendant's track, or in the manner of his doing so, or, if, negligent, yet, if satisfied that after deceased was discovered on the track defendant's servants in charge of the train negligently failed to use such care, attention, and skill, and effort to stop or check up the train, and avoid collision with deceased as they reasonably should have done after it reasonably became apparent to them that deceased would not get off the track, and if deceased received injuries resulting in his death through the fault and negligence of such servants, as above spoken of, then find for plaintiff and the two minors, intervenors, and assess their damages. As to all the other intervenors, find for the defendant, as their suit was filed too late, if a cause of action ever existed in their favor." These charges did not assume the existence of any fact

Instructions
alleged to be
erroneous.

about which there could be any controversy, and seems to us to present the law arising upon the facts very fairly.

The cases of *Galveston City R. Co. v. Hewitt*, 67 Tex. 475; 34 Am. & Eng. R. R. Cas. 63, and *Houston & T. C. R. Co. v.*

Care required of defendant—Boozer, 70 Tex. 531, are cited upon the proposition that a higher degree of care is requisite on the part of a railway company in the management of its trains than is made necessary by the charges to exonerate **Infants and adults.** appellee. The cases referred to were cases in which

children were injured while crossing railway tracks, and can have but little application to the case of an adult who deliberately walks along a railway track. In the one case the fact of infancy gives warning to those in charge of a train of want of capacity and ability of the child to take care of itself, and the law therefore imposes the duty of exercising a degree of care proportioned to the helplessness of the child, who ought not to be presumed to know when to leave a track for its own safety, or to be presumed to be able to do so with that facility and promptness that an adult could and may ordinarily be trusted to do when his safety depends on his act. In case of an adult, not known or appearing to be bereft of any of his senses, and apparently able to take care of himself, persons in charge of a train may reasonably suppose when he is seen on the track that he will leave it in time to avoid danger, and, if he does not, but is injured, then a case arises in which it becomes necessary for the jury to determine whether the injury resulted from the contributory negligence of the person injured, or from the failure of the servants of the company to exercise due care under the circumstances. In *railroad Co. v. Weisen*, 65 Tex. 442, it appears that the person injured was an old man, who at a distance of 200 yards from an approaching train, commenced leaving the track, and had succeeded in nearly clearing, when he was struck by a car step, and injured. He was seen by the engineer at the distance of 400 yards, but it was supposed that he would leave the track in time to avoid injury; and, although the signal of the approaching train was given, its speed was not slackened until it was seen that he would probably not be able to clear the track, when some effort was made to slacken the speed, or stop the train. The court found as a fact that after his peril was known the engine could have so lessened the speed as to have avoided or lessened the injury and in disposing of the case it was said: "The court below found as a fact that, after the servants of appellant discerned the danger to which appellee's negligence exposed him, they negligently failed to use the means in their power to prevent or lessen the injury. The injury would not have happened if the appellee had not been on the appellant's track at a time when he ought not to have been there; still, after it was discovered that he could not effect his escape in time to

avoid injury, it was the duty of appellant to prevent the result." This is the law dictated by reason as well as humanity, and is in accordance with other decisions in this State. *Houston & T. C. R. Co. v. Symkins*, 54 Tex. 615.

As the case was presented by the charges the jury doubtless found that the employes of appellant did not fail to use due care to prevent injury to deceased, after it became apparent that he would not leave the track. This leaves **Contributory negligence of deceased.** the case standing on his own negligence, which was evidently such as to defeat a recovery, had he survived, and the suit been brought by him. This being so, it defeats a recovery by appellants, who could only recover on facts that would have entitled the deceased to a recovery had he survived. The law applicable to the case is well settled. *Houston & T. C. R. Co. v. Smith*, 52 Tex. 185; *Houston & T. C. R. Co. v. Richards*, 59 Tex. 376; 12 Am. & Eng. R. R. Cas. 70; *Hughes v. Galveston, H. etc. R. Co.*, 67 Tex. 596; 34 Am. & Eng. R. R. Cas. 66; *Galveston City R. Co. v. Hewitt*, 67 Tex. 480; *Galveston, H. & S. A. R. Co. v. Ryon*, 70 Tex. 56. The servants of appellee had no knowledge that the deceased was a man of defective hearing, and the fact that such was his condition made it the more necessary that he should not place himself in a place of danger, rendered as to him more dangerous by the fact that he was not in the full possession of that sense. Appellants asked an instruction under which the jury would have felt authorized to enquire whether the arrangement of the train was not the proximate cause of the injury, and it is urged that it was error to refuse such a charge. In view of the facts of the case, the court did not err in refusing the charge. If there was any matter not submitted by the court below, which, in the opinion of counsel for appellants, ought to have been submitted, they should have asked a charge upon that, and, having failed to do so, cannot now complain.

There is no error in the judgment, and it will be affirmed.

Trespasser on Track—Deafness.—In an action to recover damages for the wrongful killing of a person upon a railroad track, the fact that the deceased was deaf or had defective hearing is immaterial, unless it be shown that the servants of the company in charge of the train knew of his infirmity and that they recognized him on the track in time to save him by the use of reasonable care. *State v. Baltimore & O. R. Co. (Md.)*, 16 Atl. Rep. 210.

Liability for Injuries to Deaf Persons.—See *Nichol's Admr. v. Louisville & N. R. Co.*, and note, 34 Am. & Eng. R. R. Cas. 37, 38; *Kennedy v. Denver, S. P. & P. R. Co.*, 34 Ib. 40.

BARKER

v.

HANNIBAL AND ST. JOSEPH R. CO.

(Missouri Supreme Court, March 18, 1889.)

Personal Injuries—Trespasser on Track—Duty of Company.—In an action to recover damages for the death of the plaintiff's husband, it appeared that he went upon the railroad track at a time when a train, to his knowledge, was due. The train came up behind him, and, as he did not look out for it in that direction, he was struck and killed. He could have seen the train at a distance of 200 yards and the engineer could see a person on the track for nearly the same distance. No signal was given by those in charge of the train. *Held*, that as the deceased was a trespasser on the track and the company owed him no duty except not to wantonly injure him, he could not recover in the absence of any evidence to show that he had actually been seen by the engineer.

APPEAL from Circuit Court, Buchanan County.

Action against the Hannibal & St. Joseph R. Co. by Malissa Barker to recover damages for the death of the plaintiff's husband. An instruction requested by defendant in the nature of a demurrer to the evidence was refused, and a verdict having been returned for the plaintiff, the defendant appealed.

White & Spencer, W. P. Hall, and Doniphan & Reed for respondent.

Strong & Mosman for appellant.

BLACK, J.—This is a suit by the widow of E. B. Barker, to recover the statutory penalty of \$5,000 for the death of her husband, who was run over and killed by a train of the defendant's cars. The defendant offered no evidence, and the question is whether the defendant's instruction in the nature of a demurrer to the plaintiff's evidence should have been given. The evidence offered by the plaintiff discloses these facts: Barker resided in a house close to the defendant's track. There is a public road thirty-five feet south of his house. The south side of this road is separated from the defendant's right of way by a fence, and the track of the Wabash Railway Company runs parallel to the track of the defendant, but adjoining and to the south thereof. Barker left his house, went south across the public road, which goes directly to St. Joseph, got over the fence, and ascended a bank some six or eight feet in height to the defendant's track. He then started westward on the track towards St. Joseph, where he was going, without stopping or looking to the east. He had not travelled more than sixty to seventy-

Facts.

five feet when a regular daily west-bound passenger train came through a cut, around a curve, and on a down grade, and ran over and killed him. Had Barker looked to the east, he could have seen the train for a distance of two hundred yards, and the engineer could have seen a person on the track for nearly the same distance. Barker knew the train was due when he got upon the track. There was a tie train standing on the Wabash track at the time, and it seems probable that his attention was attracted to the men at work on that train. He was a little hard of hearing, but could hear ordinary conversations. The evidence tends to show that no signal was given by sounding the whistle or ringing the bell, and that the train, if on a level track, could have been stopped in a distance of one hundred yards. It does not appear within what distance it could have been stopped on this down grade. There can be no doubt but Barker was guilty of negligence in going upon the track, at a time when he knew the train was due, without looking or listening for it. Besides this, he got upon the track at a place other than a crossing, and was making a foot-path out of the railroad track, and that, too, at a place where the defendant was required to and had fenced its road. In short, he was a trespasser, declared to be such by the statute law of this state. Section 809, Rev. St. 1879. Being a trespasser, the company owed him no duty, except not to wantonly, wilfully, or with gross negligence injure him. The company was not in duty bound to look out for him. *Maier v. Atlantic, etc. R. Co.*, 64 Mo. 267; *Hallihan v. Hannibal & St. J. R. Co.*, 71 Mo. 114; 2 Am. & Eng. R. R. Cas. 117; *Maloy v. Wabash, St. L. etc. R. Co.*, 11 S. W. Rep.; 84 Mo. 270; *Rine v. Chicago & Alton R. Co.*, 88 Mo., 392; *Williams v. Kansas City, S. & M. R. Co.* (not yet officially reported), 9 S. W. Rep. 573; *Langan v. St. Louis, I. M. etc. R. Co.*, 72 Mo. 394; *Comly v. Pennsylvania R. Co.*, 12 Atl. Rep. 496. Some of the authorities just cited and many others show that though a person is a trespasser on a railroad track, still, if such person is in a dangerous position to the knowledge of the servants of the railroad company, then it becomes their duty to use all reasonable efforts within their power and at their command to avoid injuring such person thus in the wrong. *Shear & R. Neg.* § 36. But this duty on the part of the defendant's servants only arises when and after the perilous position of the person is discovered. Now, in this case, there is no evidence whatever of a wanton or wilful injury; nor is there any evidence tending to show that the engineer saw the deceased on the track in time to have avoided the calamity. The fact that no signal was given tends to show that the deceased was not seen by the engineer, in the absence of any other evidence. But the argument is made on behalf of the plaintiff that if the engineer was at his post of duty, and on the

**Barker a
trespasser—
Duty of
company
to him.**

lookout, he could have seen the deceased, and if he was not, then he was guilty of negligence. The answer to all this is that the company owed the deceased no duty to be on the watch for him. As to passengers, it was of course the duty of the engineer to see that he had a clear track, but the defendant owed no such a duty to the deceased. As to him there was no breach of duty for a simple failure to discover him in the commission of a trespass. As stated by a reliable text-writer, the general duty of a railroad company to run its trains with care becomes a particular duty to no one until he is in a position to have a right to complain of neglect. Cooley, Torts, 660. The deceased was in no position to complain of neglect on the part of the engineer, and would only be in such a position when and after it is made to appear that some person in charge of the train saw or knew of his presence on the track in time to have avoided the injury. It is thought advisable to say again that Barker got upon the track, and was killed at a place where defendant's road was fenced, and where there was nothing in the surroundings that would naturally or reasonably lead the servants in charge of the trains to suspect that persons would be on the track. We have been speaking of the case before us, and not of others which may present a different state of facts. The death of plaintiff's husband can be attributed to nothing but his own wrongful act and reckless carelessness, and the plaintiff has no just ground for damages against the defendant, and the judgment is simply reversed.

RAY, C. J., and BARCLAY, J., dissent. The other judges concur.

Trespasser on Track—Liability of Company.—An engine and tender which were running backward on a track through the country, ran over and killed a trespasser on the track. The road was straight and the view entirely unobstructed in both directions for a distance of nearly a mile. There was no evidence to show that the presence of the deceased on the track was known to any of the employes on the train until after the accident had occurred. *Held*, that as the servants of the company were not under any obligation to keep a lookout for the protection of the deceased, the company was not guilty of negligence and no recovery could be had. *State v. Baltimore & O. R. Co.* (Md.), 16 Atl. Rep. 210.

A train on the defendant company's road, whilst it was running on a down grade, broke in two. The engineer to prevent a collision between two sections of the train, increased his speed, thus making a gap between them. The plaintiff's intestate had gone upon the track at a place where there was no crossing, and, after the first section of the train had passed, stepped upon the track in front of the second section. There was no evidence to show that any persons engaged in the management of the train knew that the deceased was on the track. *Held*, that there was no evidence upon which the plaintiff could recover, and that a nonsuit ought to have been granted. *John's Admr. v. Louisville & Nashville R. Co.* (Ky.), 10 S. W. Rep. 417.

Plaintiff's husband was killed whilst crossing a trestle 8 or 10 feet high. A clear stream 8 or 10 feet wide and 4 or 5 feet deep ran beneath the trestle, and where there was no water, there was a sand bed of soft sand forming a safe

place to jump. As soon as the train, which was a fast mail, rounded a curve so as to command a view of the trestle which was somewhat less than a quarter of a mile distant, the whistle was blown and the air brakes applied, but it was impossible to stop the train in so short a distance. *Held*, that it was not error to grant a nonsuit on the ground of the deceased's negligence. *May v. Central R. & Banking Co. (Ga.)*, 4 S. E. Rep. 330.

See *Guenther v. St. Louis, I. M. & S. R. Co.*, and note, 34 Am. & Eng. R. R. Cas. 47, 55.

SIBLEY

v.

RATLIFFE.

(50 Arkansas 477.)

Personal Injuries—Minor—Action by Parent.—Under the Arkansas Statute (Mansf. Dig., Sec. 5539) which provides that "when any person shall be wounded by a railroad train running in this State, he may sue for damages in his own name; or if he be a minor, his father if living may sue; and if the father be dead, then the mother may sue; and if both father and mother be dead, then the guardian of such minor may sue," two rights of action arise, one in favor of the infant for his personal injuries and one in favor of the parent for loss suffered by him or her.

Same—Special Finding—Sufficiency of Evidence.—On the second trial of an action to recover damages for injuries sustained by a person upon a railroad track, the engineer testified that he did not see the plaintiff until he was within 50 or 60 feet of him and that he applied the brakes and stopped as soon as he could. Upon cross-examination, it was shown that the witness had testified on the first trial that he had discovered the plaintiff about 100 yards ahead of the engine, and that in a deposition which was taken at another time he placed the distance at 75 yards. The mail agent on the train testified that he saw the plaintiff on the track several hundred yards ahead of the train. The jury returned a special finding that the plaintiff was at least 200 yards from the engine when seen by the engineer. *Held*, that the evidence was sufficient to sustain such a finding.

Same—Signal—Conflicting Testimony—Instruction.—Where the testimony as to whether the whistle was sounded by the engineer is conflicting, it is not error for the court to refuse to instruct that the positive testimony of a witness who says he heard the whistle blow, is entitled to more weight than the negative testimony of a witness who says he did not hear it.

APPEAL from Circuit Court, Lonoke County.

Action to recover damages for personal injuries sustained by the plaintiff.

U. M. & G. B. Rose for appellant.

John C. & C. W. England for appellee.

COCKRILL, C. J.—The appellee, Ratliffe, was injured by an engine of the Memphis & Little Rock Railway. He was a minor at the time; and, after obtaining permission of the court which appointed Sibley receiver of the company, brought suit, by his next friend, to recover damages Case stated.

for the injury. There was a trial and verdict for the plaintiff, which the court set aside. Afterwards the defendant moved to dismiss the action because it had not been instituted at the instance of the minor's father, mother, or guardian. Ratliffe, having reached his majority in the meantime, asked and obtained leave to prosecute the action in his own name, and the motion to dismiss was thereupon denied. A second trial resulted in a verdict for the plaintiff for \$1,500. The court refused to disturb it. Judgment was entered accordingly. The defendant took his bill of exceptions and appealed.

1. It is urged that the court erred in refusing to dismiss the action. The statute directing by whom suit may be brought for an injury, not resulting in death, done to a person by a railroad train in this state, is as follows:

Injury to minor—
Action by parent. "When any person shall be wounded by a railroad train running in this State, he may sue for damages in his own name; or, if he be a minor, his father, if living, may sue; and, if the father be dead, then the mother may sue; and, if both father and mother be dead, then the guardian of such minor may sue for and recover such damages as the court or jury trying the case may assess." Mansf. Dig. § 5539. Statutes substantially like this are in force in many of the States, and the construction placed upon them by the courts is that, in case of an injury to a minor child, two causes of action arise: one in favor of the infant for his personal injuries, and one in favor of the parent for losses suffered by him or her. *Durkee v. Central Pacific R. Co.*, 56 Cal. 388; 8 Am. & Eng. R. R. Cas. 321. See authorities collected in note to *Iron Co. v. Rupp*, 7 Am. & Eng. R. R. Cas. 30; *Shear. & R. Neg.* § 608. As a right of action accrued to the minor by reason of the injury, it was not error to permit him to prosecute the suit in his own name, after reaching his majority, to recover such damages as he was entitled to. *Smith v. Smithson*, 48 Ark. 261.

2. It is argued that the evidence is not sufficient to sustain the verdict, and that the court misdirected the jury, and refused to charge as requested. The plaintiff had started to walk over the defendant's railway track from Madison to Lonoke. On the second day of his journey, he was struck by a passing engine, and permanently injured. The jury were required by the court to find the facts specially in response to the following questions: "(1) What was Ratliffe doing when he was struck by the engine? (2) How far was the engine from Ratliffe when the engineer first saw him?" To the first query they responded as follows: "We, the jury, believe the plaintiff was, at the time he was struck, sitting on the side of the track asleep." And to the second, that "he was at least two hun-

Person on track—
Special findings—
Sufficiency of evidence.

drea yards from the engine when seen by the engineer." Upon both propositions the evidence was conflicting. As the jury is the final arbiter or trier of the facts, we pass by the evidence which contradicts the verdict, and look only to that which tends to sustain it. If, out of the conflicting mass, we find enough to justify the verdict, we decline to interfere, in accordance with a long-settled practice, regardless of the preponderance of the evidence. It is not contended that there is no evidence to support the first special finding of the jury. It is said there is none to sustain the second special finding, or the general verdict. The engineer testified that he did not see the plaintiff until he was within fifty or sixty feet of him; that he was lying on the ground near the rail, and so obscured as to render it impossible to see him earlier; that he recognized the object as a man the instant he saw it; and that he put on the brakes, reversed the engine, "stopped as soon as he could, and blew the whistle." Upon cross-examination it was developed that this witness had testified, on the former trial of the cause, that he discovered the plaintiff about one hundred yards ahead of the engine; and that, in his deposition which was taken at another time, he placed the distance at seventy-five yards, and said that he had sounded the alarm to warn the plaintiff of his danger. Bush, who was a United States mail agent on the train, testified that he was standing in the door of the mail car just before the accident, ready to throw the mail sack off at the next station; and, as he looked ahead, he saw the plaintiff on the track, or ends of the cross-ties, several hundred yards ahead of the train; that he turned to Rowland, who was in the car with him, and told him of the circumstances; and that Rowland went to the car door in time to see the plaintiff about fifty yards in front of the engine. Rowland corroborated the latter part of this statement. It was in proof that the train could have been stopped within a distance of 350 feet; that the whistle was not sounded or the bell rung. It is immaterial whether the jury was accurately correct in fixing the distance at which the engineer discovered the plaintiff on the track at not less than 200 yards. If his perilous condition was discovered at a less distance, the collision might have been prevented. When we look to the engineer's statement that he discovered the plaintiff at the earliest moment it was physically possible to see him from his position in the cab, and to that of Bush that he (Bush) actually saw him several hundred yards ahead, from a less advantageous position, we cannot say there is any inaccuracy in the special finding. From the conflicting statements of the engineer alone, the jury could have drawn the conclusion that he saw the plaintiff 100 yards in front of the engine, and realized the peril of his position at once; and if they further believed the testimony of other witnesses, to the effect that he made no effort to avert the dan-

ger or warn the victim, their conclusion was justifiable. We cannot say that the verdict is without evidence to sustain it.

3. The law governing the duty of a railway to a trespasser upon its track has been stated time and again by this court. *St. Louis, I. M. & S. R. Co. v. Monday*, 49 Ark. 257; *Duty of railroad to trespassers.* 31 Am. & Eng. R. R. Cas. 424; *St. Louis, I. M. & S. R. Co. v. Fairbairn*, 48 Ark. 491; 30 Am. & Eng. R. R. Cas. 166; *Little Rock, M. R. & T. R. Co. v. Haynes*, 47 Ark. 497; 28 Am. & Eng. R. R. Cas. 572; *St. Louis, I. M. etc. R. Co. v. Wilkerson*, 46 Ark. 513; *St. Louis, I. M. etc. R. Co. v. Ledbetter*, 45; Ark. 249; *Little Rock & F. S. R. Co. v. Pankhurst*, 36 Ark. 371; 5 Am. & Eng. R. R. Cas. 635; *St. Louis, I. M. etc. R. Co. v. Freeman*, Id. 41; 4 Am. & Eng. R. R. Cas. 608. It is not necessary to do more than cite the previous cases, and state the substance of the court's charge to the jury, to show that the defendant was not prejudiced in this respect. Only a part of the court's charge in this case was excepted to, and our attention is not directed to any part of it as being inconsistent with what we have previously ruled in similar cases. Only errors of omission, or rather of refusal to charge as requested by the defendant, are assigned here. The jury were instructed, in the language asked by the defendant, to the effect that the plaintiff was a trespasser while on the railway track; that he went upon the track at his peril; and that he could not recover unless he showed that he was wilfully injured by the company's agents, or unless they, knowing his perilous situation, and that he was not apprised of his peril, recklessly ran the train on him. They were told that the servants of the company had the right to presume that he (plaintiff) would get off the track in time to avoid injury unless there was something unusual in his situation to warn them that he would not; that they were not bound to check the speed of the train unless they discovered that there was; and that an omission to sound the whistle or ring the bell must have been wilful and reckless, to warrant a recovery. Other requests in the line of those already given were rejected. We cannot say that was error.

4. The refusal to give the following language in charge to the jury is the final assignment of error: "The positive testimony of a witness who says he heard the whistle blow, is entitled to more weight than the negative testimony of a witness who says that he did not hear it." *Signals—Conflicting testimony.* It is doubtful, from the conflicting statements of the engineer, whether he sounded the whistle before the injury was inflicted. As to whether it was sounded or not, the testimony of other witnesses is conflicting. It was the province of the jury to determine the question of veracity between the witnesses. The rejected request to charge upon this point may be a correct statement of a conclusion of logic when the witnesses who testify

negatively and affirmatively are of equal credibility, and have the same opportunities for hearing the signal. But the request falls short of stating the full proposition. *Keith v. State*, 49 Ark. 439. It may be doubted whether, if proper in any case to instruct the jury on the weight to be given to evidence (see *Keith v. State*, *supra*), it cannot be said to be error to refuse to do so (*Chicago & Alton R. Co. v. Robinson*, 106 Ill. 142; 19 Am. & Eng. R. R. Cas. 396, and note.) It was not error to refuse the request.

Affirmed.

Injuries to Children—Right of Action.—The general rule is that the father has a right of action for loss of services and expenses occasioned by injuries to his minor child, while the child, by his next friend, may recover damages for the injuries. *Wilton v. Middlesex R. Co.*, 125 Mass. 130; *Texas & P. R. Co. v. Morin*, 25 Am. & Eng. R. R. Cas. 539; *Houston & G. N. Railroad Co. v. Miller*, 51 Tex. 275; s. c., 49 Tex. 322; *Central R. Co. v. Benison*, 64 Ga. 475; s. c., 8 Am. & Eng. R. R. Cas. 343; *Durkee v. Central Pac. R. Co.*, 56 Cal. 388; s. c., 8 Am. & Eng. R. R. Cas. 321; *Little Rock & F. S. R. Co. v. Barker*, 33 Ark. 350; *Coolington S. R. Co. v. Packer*, 9 Bush (Ky.) 455; *Ohio & M. R. Co. v. Tindall*, 13 Ind. 266; *Stak v. Baltimore & Ohio R. Co.*, 24 Md. 84; *Cregin v. Brooklyn C. R. Co.*, 75 N. Y. 192; *McGovern v. New York Cent. & H. R. R. Co.*, 67 N. Y. 617; *O'Mara v. Hudson River R. Co.*, 38 N. Y. 445; *Pennsylvania R. Co. v. Butler*, 57 Pa. St. 335; *Oakland R. Co. v. Fielding*, 48 Pa. St. 320; *Pennsylvania R. Co. v. Zebe*, 33 Pa. St. 318; *Ewen v. Chicago & N. W. R. Co.*, 38 Wis. 613. A diminution in the capacity of the child to earn money during his minority gives a cause of action only to the parent, unless it is shown that the child has been emancipated. *Texas & P. R. Co. v. Morin*, 25 Am. & Eng. R. R. Cas. 539; *Railroad Co. v. Miller*, 51 Tex. 275.

ILTIS

v.

CHICAGO, MILWAUKEE AND ST. PAUL R. CO.

(*Minnesota Supreme Court, March 19, 1889.*)

Pleading—Amendment—Discretion of Court.—In an action to recover damages for the negligent killing of a person upon a railroad track, it is not an abuse of the discretion of the court to refuse to allow the defendant to withdraw an admission that the death of the deceased directly resulted from the accident, and to assert that the accident was but the remote cause of the death, when the application for such amendment is not made until the second day of the trial.

Negligent Killing—Contributory Negligence—Spur Track.—Deceased was employed in a brickyard, for the accommodation of which a spur track had been constructed. When wood was required for the kilns laborers from the brickyard would uncouple a car and would, by hand, push it down grade to the desired point on the spur track opposite the kilns. It was well known to the switch crew employed at this point that this was the custom of the brickyard hands. Whilst the deceased was engaged in pushing a car of wood along the spur track, the switch crew backed down a number of other cars until they struck the car which the deceased was pushing in such a manner that he was caught and

crushed so seriously as to cause his death. Previously to approaching the wood car the locomotive had backed down and placed it upon a side track. The evidence showed that it had usually been regarded that the brickyard employes might safely approach and work about the cars after the locomotive had pushed them down and had withdrawn. *Held*, that the deceased was not guilty of contributory negligence and that the plaintiff was entitled to recover on account of the negligence of the switch crew in moving the cars down without taking precautions to guard against injuries to those pushing the car of wood.

APPEAL from District Court, Carver County.

Action against the Chicago, Milwaukee & St. Paul R. Co. by Frederick Iltis, as administrator of the estate of one Happ, to recover damages for negligently causing the death of the plaintiff's intestate. The defendant appeals from a verdict and judgment for the plaintiff.

W. H. Norris for appellant.

W. C. Odell and *H. J. Peck* for respondent.

COLLINS, J.—The plaintiff, as administrator of the estate of one Happ, brought this action against defendant railway company, to recover damages for causing, through negligence, the death of his intestate, in the month of June, 1886, and secured a verdict in the court below. From an order denying a new trial, defendant appeals.

The appellant's main line of road runs through the village of Chaska, easterly and westerly, and about 300 feet south of the brickyard of Riedele & Sons, in which Happ had
Facts. worked as a common laborer some two years when killed. A spur track, used solely for Riedele & Sons, extends from the east side of their brickyard along in front of the kilns across Pine street, near its intersection with Sixth, and thence obliquely over and across Sixth to the main line. The general course of this spur or side track is southwesterly, and it is nearly 500 feet in length. Between the yard and the main line is another spur known as the "Bierline side track;" the switch thereof being some 300 feet south of the kilns. More or less switching was done in the forenoon of each secular day in this vicinity by a locomotive and crew of men who came for that purpose from another station, the men being well acquainted with the work. The switching done upon the Riedele track consisted in first taking out loaded cars,—usually six or seven in number,—and then putting in empties, and cars filled with wood for use in making brick. This was done almost daily, and these cars were usually left, coupled together, east of the plank crossing upon Pine street, and near the kilns. Occasionally a part would be left between the plank crossings on Pine and Sixth, in the streets. As the empties were needed for loading, or as the wood could be unloaded during the day, laborers from the yard would uncouple a car, and by hand easily push it down grade to the desired point opposite the kilns. This practice was well known to the switch-

ing crew, as was shown by the testimony. And it was also well established upon the trial that it was the invariable custom of the train men to make up the cars destined for the brickyard side track out on the main line and Bierline spur, in the exact order indicated by a "switching list" prepared by the station agent, or under his supervision, and then set them in in such order. In other words, it was the rule to put the cars for the yard in a certain order elsewhere, and then, by one trip of the locomotive upon the side track, place them, coupled together, where they would remain until moved by the laborers,—Happ being one of the men who habitually helped in the moving. This long established practice was not observed upon the day of the accident. Seven cars—three filled with wood—had been set apart for the brickyard switch, and a list furnished the conductor. The seven had been placed in the designated order upon the Bierline spur (the wood cars being the fourth, fifth, and sixth from the locomotive, which was attached at the west end of the string), when a transposition was ordered, so as to place a car of wood nearest the kilns.

The appellant claims that this order was given, just as the train was moving, by one of the proprietors of the yard, who happened to board the third car from the locomotive, about this time. This is denied by the person so charged, although he admits having so directed the station agent, earlier in the day. We fail to see that discussion over this point is of any consequence to appellant, for it is immaterial who caused the shifting of the cars, if thereby negligence resulted, and deceased, without contributing to such negligence, lost his life. In order to put the wood first upon the side track the train was pulled off from the Bierline spur, and westerly along the main line to within a few rods of the brickyard switch, when it was uncoupled between the fourth and fifth cars, both of which were loaded. This left three empties, and one box car filled with wood, attached to the engine, while one empty and two loaded remained on the main line. The four cars attached to the locomotive,—the one filled with wood now in the front,—were then pushed easterly along the side track in the direction of the kilns until they cleared the planking at the Pine street crossing, when the engine returned to the main line for the balance of the train. It is obvious that immediately after this Happ and two other laborers from the yard came to the west end of the car of wood, and commenced to push it along further east. While so doing, and before they had gone many feet, the locomotive returned with the three cars, pushed them along until they struck those previously placed on the side track, throwing all forward with sufficient force, and in such a violent manner, that the deceased was caught and crushed (as he was pushing the wood car) so seriously as to cause his death the next day.

Twenty-three errors are assigned by appellant, and these may be condensed into five, for consideration in this opinion. First, error in refusing to allow an amendment to the answer; second, in excluding certain testimony offered by appellant; third, in refusing to submit specific questions for the jurors to answer, with their general verdict; fourth, in giving certain instructions to the jury; fifth, in holding that the evidence justified the verdict.

The answer admitted, we think, although this was not unreservedly conceded by appellant's counsel upon the trial, that Happ's death resulted directly from the accident.

Amendment to answer— The amendment, which was not proposed until the second day of the trial, withdrew this admission, and **Abuse of discretion.** asserted that the accident was but a remote cause of the death. The application to amend is always addressed to, and must largely rest in, the discretion of the court. There was no abuse of discretion in the refusal to permit the amendment asked. It follows that many questions thereafter asked, which would have been pertinent under different issues, were immaterial and irrelevant, as held by the court when objection was made.

The appellant argues that the court erred greatly in excluding testimony tending to show that it was the custom of the yard men to keep away from the cars while switching was in progress. The court properly sustained an objection to a question concerning this custom, but notwithstanding the ruling the witness seems to have answered. He stated that he had never known, nor had he seen yard men about while switching was being done. Had appellant followed its usual method on this occasion, and put the seven cars on the side track as a whole, and by one trip of the locomotive, the custom of the laborers might have been material. Had it pursued its usual course, the deceased and his fellow servants would have done their work in perfect safety. Although the custom seems to have been shown despite the attempt to exclude it, it was immaterial, the circumstances not being the same.

In a proper exercise of its discretion the court refused to submit and send out with the jury six special findings prepared by counsel for the appellant, to which he asked answers. **Special findings—** Nearly all were immaterial. Their discussion by the jurors would have led to much confusion over matters of little or no moment, while the views of the jury, **Refused to submit.** whether affirmatively or negatively expressed, would be of no value to either of these litigants. We see no reason for sustaining the counsel's assertion that the court in its rulings upon this question abused its discretion.

The charge of the court stated the rules of law which govern

actions of this character—so well known that repetition is unnecessary—concisely, completely, and with evident fairness. Possibly paragraphs might be found which, considered independently of those which preceded or followed, might have misled, but as a whole it was without contradictory or irreconcilable propositions. We are confident that by it the jury was well and fairly advised of the law applicable to the issues.

Rules of
law gov-
erning
the action.

We now approach a brief review of the facts as they were disclosed by the evidence, and a discussion of the appellant's contention that the verdict of the jury was manifestly and palpably against the weight of the testimony. To sustain the charge that the train men were negligent in handling appellant's locomotive and cars when going upon the side track a second time, testimony was introduced by the plaintiff tending to show that the usual signal—ringing the bell—was omitted, and a negligent and dangerous rate of speed maintained, by means of which the six cars immediately in front of the engine were violently and negligently precipitated forward onto the one which was being moved to its destination, near the kilns. There was testimony that the bell upon the locomotive was not rung at all, by one or two persons who seem to be very positive about it, as well as by others who claim to have been in a position to hear it had it been in motion, and did not. Should we agree with counsel for the appellant that the preponderance of the testimony on this point is with him, the verdict could not be set aside for that reason alone. There was testimony which would warrant the jurors in concluding that the customary signal of warning was not given when the second installment of cars was being pushed along the side track for coupling with the others. We have not overlooked *Harris v. Minneapolis & St. Louis Railway Co.* 33 Minn. 459, cited by counsel as recognizing the distinction which should be made between positive testimony that signals were given and negative testimony that they were not,—a doctrine which he claims is pertinent here. In that case plaintiff attempted to show by one witness, who did not claim to have been in a position to hear had they been given, that the customary signals—sounding the bell and whistle—were neglected as the train approached a road crossing, while upon the other hand, there was positive evidence that the bell was rung and the whistle blown in a proper manner, and at the usual place. As it did not appear probable that plaintiff's witness would have heard the signals had they been given, his testimony, simply that he did not hear them, was considered as of no value whatever as against positive evidence to the contrary. Had the plaintiff's witness in that case been in a position to hear the signals, if sounded, the testimony could not have been char-

Failures to
give signal-
Evidence.

acterized as valueless. Here the disagreement between the witnesses as to the ringing was as sharply drawn as it well could be. In this connection we call attention to the fact that when in this vicinity, when on the main as well as side tracks, it was the habit to sound the bell continually, according to appellant's witnesses; that the cars which were being put on the brickyard spur preceded the motive power, upon which was the bell; that in such a position its ringing would naturally attract less attention than if it had been in front of instead of behind the cars; and that, had the deceased heard it,—a second trip upon the spur being a departure from the rule, and therefore unexpected by Happ and those with him,—there might be some excuse for suggesting that these men were liable to be misled, and to have assumed that the ringing was out on the main line.

The testimony shows that defendant had no brakeman upon the cars first set in. They seem to have been left under the management of one of Happ's employers,—Anton Riedelee,—and two young boys, one of whom was at the brake on top and at the easterly (front) end of the car of wood. When the locomotive reached the Pine street crossing, it was cut off, and immediately returned to the main line. The cars then run slowly along towards the kilns, until stopped by the setting of the brakes by Riedelee and his companions. The boy upon the wood car, directed so to do by Riedelee, clambered down, and uncoupled it from the others, and then returned to the brake. It began to move down grade, about the time the laborers commenced to push on the westerly end, and had gone but a few feet (10 or 15,) when Riedelee discovered the approach of the balance of the consignment of cars, and shouted to the boys to seize the brakes and prepare for the shock, which he seems to have realized as imminent. It is apparent that Riedelee knew that all the cars were not put in together, but it is not shown that he was aware of the position of Happ, or that his men were anywhere about the wood. But had it been, or had it appeared that his misconduct and negligence contributed to the injury, that would have been no excuse for the appellant. There is much difference of opinion between the witnesses as to the rate of speed with which the last cars were sent upon the spur. We can best judge of the momentum by the results. These clearly indicate that they came back to the stationary cars with force sufficient to make considerable noise as they collided, and to cause Riedelee and the boys some difficulty in maintaining their places on top, although they were sitting down, holding to the brakes, prepared for the crash. It is also evident that they came back with such rapidity and violence as to put three cars, with set brakes, in rapid motion, and to propel them forward with speed and suddenness sufficient to over-

Evidence as to company's negligence considered.

take and catch the men at the rear of the wood car, 10 or 15 feet in advance, and already moving. Without considering the testimony of the two persons who assert positively that one of the train men, either from the ground or from the top of one of the cars, used vigorous language to the engineer because he did not "back up" with more force, these facts and circumstances tend strongly to indicate that, whatever the rate of speed may have been, the locomotive and cars were not properly controlled. The appellant's negligence was well demonstrated by the testimony.

The case therefore resolves itself into a question of contributory negligence. Happ had been steadily employed about the yard for some two years, assisting daily in pushing cars into position, east of the place where usually left by the appellant. From daily observation he could have, and undoubtedly did, learn the well established method of putting cars upon the spur; that it was safe for him to approach and work about the cars after the locomotive had once appeared and withdrawn; and that there was no danger to be apprehended, because the locomotive was upon another track, engaged in other business. There was nothing to indicate that on this day there would be a dangerous departure from the common practice of at least two years' standing, or to suggest that he could not perform his ordinary work with as perfect safety as on previous occasions. The deceased, educated by the appellant's customary habit, had a right to depend to some extent upon his knowledge, to rely upon a well-generated conviction that it was an ordinarily safe place, when one trip had been made, and the cars left upon the side track. Of course this knowledge of the common practice would not warrant indifference or carelessness by those engaged about such a place, for it always has its hazards; but it would excuse a want of that care and diligence imposed upon people when approaching and crossing railways, in general. It would, in a degree, absolve one should he be less alert and watchful when going upon the track.

Contributory
negligence
of deceased.

It is impossible to say that the deceased took the precaution to look and listen before stepping upon the track, but the testimony discloses that persons occupying a much more elevated position, on top of the cars, (some of whom knew that the engine would return) neither saw nor heard its approach until a moment before the collision. It is also evident that several men in the vicinity did not hear or see it until the crash came, while others, who saw it and watched its coming, state that they did not hear the bell sound. And one of Happ's comrades testifies that just as he closely followed Happ in between the cars, he looked and saw the locomotive "pushed out" at the switch. If Happ used his eyes, it is fair to presume that he too saw the engine in a position upon the main line which had for a long period of time—without a single exception, so far as the

record shows—signified absolute safety to those employed about the brickyard. If by listening when he went upon the track he could not hear a note of warning because there was none, or if, by looking, he was lulled into a sense of security by reason of the well-settled custom of the appellant, it would not seem to be important to show that he was vigilant, or did either. The deceased was bound to exercise such diligence as persons of common prudence and intelligence would exercise under the circumstances. In considering what ordinary prudence required with the surroundings of this transaction, regard must be had to the danger to be apprehended, the reasonable probability of incurring it, as well as the natural presumption that the appellant would discharge its duty, and act with due care. See *Shaber v. St. Paul, M. & M. R. Co.*, 28 Minn. 103; 2 Am. & Eng. R. R. Cas. 185. The deceased cannot be charged with negligence by failing to anticipate some particularly negligent act of the train men, or, as in this instance (if the plaintiff's witnesses and manifest results of the collision can be depended upon), their evident negligence in putting the second section of cars upon the side track without warning, without a lookout, and at a dangerous rate of speed. The order refusing a new trial is affirmed.

Personal Injuries—Contributory Negligence.—While plaintiff, an experienced railroad man and yardmaster of another company, was standing between the tracks he was struck by a train belonging to the defendant which came upon him from behind. The accident occurred in the yard where there were many tracks and trains were consequently being made up. There was evidence to the effect that at the time of the accident the locomotive bell was ringing. The plaintiff when struck was not in a place where he should have been in the proper performance of his duty. There was no light on the rear end of the train which struck him. *Held*, that the plaintiff's negligence and not that of the defendant was the proximate cause of his injuries and that he could not recover, notwithstanding the absence of a light from the defendant's train. *Ryall v. Central Pacific R. Co. (Cal.)*, 18 Pac. Rep. 430.

Plaintiff with full knowledge of the custom of a railroad company as to the use of its switch engines in the removal of cars thrown in upon a T track stepped upon the track and attempted to cross in the front of a moving engine. At the time of the accident a passenger train was standing upon a parallel track awaiting the clearing of the main track by the throwing in of the freight cars. *Held*, that as the plaintiff could by looking and listening for approaching trains have avoided the injury, he was guilty of such contributory negligence as barred his right to recover. *Ohio & Mississippi R. Co. v. Hill (Ind.)*, 18 N. E. Rep. 461.

Contributory Negligence—Sufficiency of Finding.—In an action against a railroad company for causing the death of the plaintiff's intestate, the jury returned a special finding that the deceased was a trespasser and that his death was caused wholly by his negligence and without any fault or negligence on the part of the servants of the railroad company. *Held*, that the fact that the jury failed to agree on the question whether it was the railroad company's duty to have a brakeman at the end of the train where the deceased was killed, and whether such brakeman would have prevented the accident, was immaterial. *Whitlock's Admr. v. Pennsylvania R. Co. (Ky.)*, 11 S. W. Rep. 209.

By section 1144 of the Alabama Code, the engineer is required to ring the bell or whistle at least a quarter of a mile before entering any village, town or city, and to continue to do so at intervals while running within the limits of the same.

By section 1700 of the Code (as amended by the act of February 28, 1887), it is provided that in actions for injuries resulting from a failure to comply with the requirements of section 1144, the burden of proof is upon the company to establish a compliance therewith, when it has been shown that a person has sustained injuries which can easily be traced to a nonobservance of the statutory requirements. In an action to recover damages for the killing of a child less than two years of age, it appeared that the engineer did not blow the whistle or ring the bell on entering the corporate limits or while passing through the town; that the road was straight for about sixty yards from the place where the child was killed; that the train was running at the speed of twelve or fifteen miles an hour on an up grade; that the engineer had the window on his right closed, although he kept a look-out through the front window; that there were two brakemen on the car, one of whom was sitting on the end of a car thirty feet distant from the brake; that the latter failed to reach the brake before the child was run over, having been thrown down by the jostling of the car. There was no evidence to show within what distance the car could have been stopped by the use of the brakes. *Held*, that the evidence was not sufficient to establish negligence on the part of the train hands, or to show that the conditions were such that the train could not have been stopped in time to prevent injury if a proper look-out had been kept and all means at hand had been promptly used to stop the train. *Georgia Pacific R. Co. v. Blanton* (Ala.), 4 S. Rep. 621.

Plaintiff was engaged in the construction of a sewer beneath a railroad track in a tunnel. The work was carried on at night only, when the tunnel was closed to the passage of trains. On the evening of the accident plaintiff entered the tunnel before trains had stopped running through it. The jury returned special findings to the effect that the engineer did not and could not see plaintiff. *Held*, that as plaintiff had voluntarily put himself in a dangerous position at a time when, and place where he had no right to be, his injuries were the result of his own negligence and that a demurrer to the evidence should have been sustained. *Loeffler v. Missouri Pac. R. Co.* (Mo.), 9 S. W. Rep. 580.

In an action to recover damages for personal injuries, plaintiff testified that he was in the depot of the defendant on business; that the passenger platform was alongside tracks which ran between it and the depot; that there was also a side track which went through the depot; that he passed out of the depot by the usual way and was struck between the wall of the depot and the platform. He further testified that the way he was going he could not see a train approaching from the east because there was a car on the side track and he had no warning of any approaching train, although he listened as he went out of the depot. There was also some evidence that there was so much noise about the place of exit from the depot that the sound of the advancing train could not be distinguished. The opposing testimony was to the effect that plaintiff ran carelessly through the depot; that he knew that the train was approaching and that he might have guarded himself against it; and that he stopped at the exit of the depot long enough to have looked backward. *Held*, that the question of the defendant's negligence and of the plaintiff's contributory negligence were for the jury, and that it was error for the court to direct a verdict for the defendant. *Jones v. East Tenn., Va. & Ga. Co.*, 128 U. S. 443.

MEMPHIS AND CHARLESTON R. CO.

v.

WOMACK.

(84 Ala. 149.)

Negligent Killing—Evidence—Res Gestae.—The declaration of one of the train men made immediately after the stoppage of the train in consequence of an accident, that they had run over a man and killed him, is not admissible as part of the *res gestae*.

Persons on Track—Implied Licence—Duty of Company.—The right of way of a railroad company is its exclusive property; and the fact that persons have been accustomed to walk on the track does not confer upon the public a right to use it, nor create any obligation on the company to look out for persons using it other than the general duty of look-out for obstructions.

Same—Contributory Negligence—Intoxicated Person.—In an action for negligently causing the death of the plaintiff's intestate, it appeared that the last time the deceased was seen alive he was walking on the railroad track at the entrance to a cut, where there was no public crossing. He was intoxicated at the time, but his intoxication was not known to persons in charge of the train. He could not be seen by the engineer until the train was within sixty or seventy feet of him and the train could not be stopped within that distance. *Held*, that the accident was the result of the deceased's own negligence and that plaintiff could not recover.

Same—Evidence—Coroner's Verdict.—The verdict of the coroner's jury that deceased was accidentally run over by one of defendant's trains is inadmissible in an action to recover damages for his death.

APPEAL from Circuit Court, Jackson County.

Action by Martha Compton, as administratrix of her husband, Charles Compton, against the Memphis & Chattanooga R. Co. to recover damages for the negligent killing of plaintiff's intestate by one of defendant's trains. Whilst the suit was pending the plaintiff married one Womack, and the court thereupon ordered that the action should be continued in the name of Martha Womack, administratrix, etc. Defendant pleaded the plaintiff's marriage as a bar to the continuance of the suit, but a demurrer to the plea was sustained. Evidence was received on behalf of the plaintiff that a witness heard one of the train men say after the killing and stoppage to the train, "We have run over a man and killed him dead as hell." Evidence of the verdict returned by the coroner's jury that the deceased was accidentally run over by one of defendant's trains was excluded. The defendant appeals from a verdict for the plaintiff.

Humes, Walker, Sheffey & Gordon for appellant.

Brown, Brickell & Hunt for appellee.

CLOPTON, J.—The declaration of one of the train men, testified to by the witness Larkin, should have been excluded, on the authority of the following cases: Alabama G. S. R. Co. *v.* Hawk, 72 Ala. 112; 18 Am. & Eng. R. R. Cas. 194; Tanner *v.* Louisville & N. R. Co., 60 Ala. 621. The declaration was not sufficiently connected with the main fact or contemporaneous therewith, to constitute a part of the *res gestæ*. Without serving to explain or elucidate its character, it was merely a heartless narration of a transaction really and substantially past, only tending to prejudice the minds of the jury, and which should not and does not bind the defendant.

**Evidence—
Declaration
of train men
—Res gestæ.**

It is the settled doctrine in this State, supported by the great weight of authority in England and America, that ordinarily the right of way of a railroad company is its exclusive property. Its free and unobstructed use is essential to the transaction of the business of the company in transporting freight and passengers, and to the safety of its trains. Mere acquiescence in the use of such right of way does not confer on the public a right to use it, nor create any obligation to look out for persons using it, other than the general duty of lookout for instructions. In the absence of law making such acts punishable, railway companies are powerless to prevent such use of their tracks. Under the conditions in which they are situated, physical prevention is impracticable, and acquiescence is morally compulsory. Mere acquiescence, under such circumstances, is not permission. Coal Co. *v.* Davis, 79 Ala. 308; Frazer *v.* South and North Ala. R. Co., 81 Ala. 185; 28 Am. & Eng. R. R. Cas. 565; Tanner *v.* Louisville & N. R. Co., *supra*. The evidence of the custom of persons to walk on the track was calculated to mislead the jury by inducing the inference that the defendant owed deceased a greater and other duty, at the place of the accident, because of such custom, than to intruders at other places not so used. It should have been excluded.

**Acquiescence
in use of
track by pub-
lic—Duty of
company.**

As the judgment must be reversed, and only two enquiries are involved, a consideration and discussion in detail of the charges given and refused by the court would be an unnecessary and tedious extension of this opinion. It will better suffice the purpose of another trial, and a correct determination of the case, to state the principles of law which are applicable and should govern its decision, on the undisputed facts and the tendencies of the evidence as to any facts controverted. The following facts cannot be disputed: The deceased left Larkinsville about sundown, intoxicated, to go home, about half a mile distant. There was a dirt road running parallel with the railroad. The deceased, the last time he was seen alive, was walking on the

**Failure of
trespasser to
look out for
train—
Intoxicated
person.**

railroad track, and was killed about night-fall at the entrance of what is called the "Little Cut," where there is no public crossing. He was clearly a trespasser on the right of way of the defendant. Persons in charge of a train are not required to anticipate wrongful intrusion on the track. They have a right to presume and act on the presumption, that intelligent beings will leave it free and unobstructed for passing trains. The law does not impose any obligation to use special precaution against possible, but unanticipated, injuries to trespassers. A railroad company does not owe to an intruder the duty to keep a vigilant lookout for obstructions when such lookout is only rendered necessary by his wrongful act. As there is no duty to anticipate wrongful acts in others, the omission to keep a vigilant lookout for trespassers is not a failure in duty to such wrong-doers. Any person who enters and walks at places where the public have no right, unless by the invitation or licence of the company, is a trespasser, and assumes the peril of the position in which he has voluntarily placed himself. These views are not intended to antagonize or impair the rule that a failure to keep a lookout when a train of cars is being moved within the limits of a town or city, or passing a public crossing, fixes the charge of negligence, as held in *Savannah etc. R. Co. v. Shearer*, 58 Ala. 672; *South and North Alabama R. Co. v. Sullivan*, 59 Ala. 272; and *South and North Alabama R. Co. v. Donovan*, 84 Ala. 141. Under the circumstances of this case, the intoxication of the deceased does not exempt him from the consequences of his contributory negligence. His intoxication was unknown to the persons in charge of the train, and they had no reason to anticipate that he was on the track in such condition. On the undisputed facts, the court should instruct the jury that the contributory negligence of the deceased disentitles the plaintiff to recover, unless the defence is overcome by the failure of the defendant to perform a duty subsequently arising and imposed by law. *Memphis & C. R. Co. v. Copeland*, 61 Ala. 376; *Frazer v. South and North Alabama R. Co.*, *supra*; 6 Am. & Eng. R. Cas., note 19. From a regard for human life, the law imposes the duty of due precaution and reasonable effort to prevent unnecessary injury. Having said that there was no special obligation to discover the deceased, unless, it may be, that the agents or employes of the defendant had information which should lead them to anticipate he was on the track, no special duty to him arises until he is discovered; and, when discovered, if his intoxication was unknown, those in charge of the train had a right to presume that he would extricate himself from the danger of an impending collision. The nature and extent of the duty is that no injury shall be produced by wanton or reckless or intentional negligence. If, after the deceased was seen, and his peril discovered, or the train was in a

position that those in charge ought to have discovered his peril—that is, if it would be manifest to a vigilant observer that he was unaware of his danger, or unable to extricate himself,—it became then their duty to use proper skill and diligence to make reasonable and necessary efforts to avoid injuring him. The omission to do so, when such injury might have been prevented by a prompt resort thereto, constituted wanton or reckless or intentional negligence. This rule, however, does not apply, if when the deceased and his peril were discovered, the train was so near that preventive effort could not have availed to avert the catastrophe. *Frazer v. South & North Alabama R. Co., supra.* The enquiry in such case is, could the injury have been averted by the use of reasonable skill and diligence after, not only the deceased was seen on the track, but also his peril discovered? It only remains to apply these principles to the aspects of the case presented by the tendencies of the evidence. The deceased was killed at a place where the track curves, and where he could not have been seen at as great a distance as on a straight track. The only reasonable inference is that he was lying down, either asleep, or insensible to danger from drunkenness. If the evidence of the engineer be believed, who is the only witness testifying to the immediate facts of the accident, the deceased, at the place and in the position in which he had placed himself, could not have been seen until the train approached to within 60 or 70 feet of him. When the engineer first discovered some object on the track, which he could not have done sooner, the train could not have been stopped, in time to prevent striking it, by the use of all the appliances at hand. If these be the facts, no skill and diligence, and no preventive effort, could have averted the accident, and the defence of contributory negligence is not overcome. The court should so instruct the jury.

There is no error in excluding the verdict of the coroner's jury.

By the marriage of the plaintiff during the pendency of the suit, she did not cease to be administratrix. Her mere marriage is not the proper subject of a plea against the further continuance of the suit. But, as her husband became administrator in the right of his wife, the suit should not be allowed to proceed in the name of the plaintiff acquired by the marriage, without joining her husband as co-plaintiff. Section 2602, Code 1886, does not apply to such case.

**Abatement
of action—
Marriage of
administratrix**

Reversed and remanded.

STONE, C. J. (*dissenting*).—The authorities are in conflict on the question whether railroad officers owe any duty of watchfulness or care to trespassers on their track at places other than cities, towns, and public crossings. I think the spirit of our decisions leads to an affirmative answer to this enquiry. *Tanner v.*

Louisville & N. R. Co., 60 Ala. 621; South & North Ala. R. Co. v. Sullivan, 59 Ala. 272; Gothard v. Alabama Great Southern R. Co., 67 Ala. 114; Cook v. Central R. & B. Co., Id. 533; Frazer v. South & North Ala. R. Co., 81 Ala. 185; 28 Am. & Eng. R. R. Cas. 565. So I think humanity and the known habits of the public impose the duty of ordinary care in such cases. I cannot agree to the rule declared by my brothers, but would be willing to hold that when a trespasser, under such circumstances, complains of an injury, the burden is on him to establish want of diligence on the part of those in charge of the train.

Intoxicated Person—Sleeping on Track.—In an action to recover damages for the negligent killing of plaintiff's intestate, it appeared that at the time of the accident the deceased was drunk; that he was lying outside of the track and at right angles to it, his head between the jutting ends of two cross ties in a depression and invisible until the train was almost upon it; that a small portion of his body was slightly visible to an approaching engineer, but that no part was visible which approached nearer than 16 or 18 inches to the rail; that it was impossible to tell from the visible part that it was a human being, and that when the train was so near the deceased that it was impossible to stop it before striking him, he raised his head and thus disclosed for the first time that it was a human being. If the deceased had not raised his head, the train would have passed without harming him. *Held*, that the death of the plaintiff's intestate was the result of his own negligence, and that there could be no recovery. *Columbus & Western R. Co. v. Wood (Ala.)*, 5 S. Rep. 463.

Same—Contributory Negligence.—Deceased, who was partially intoxicated, was killed by an engine belonging to the defendant whilst he was walking upon the track in the defendant's railroad yard where trains were constantly being made up. Just before dark, deceased started from a point near the tracks, of which he had a good view, to go to a point several hundred yards distant on the other side of the track. There were three other routes by which he could have reached his destination without going on the tracks except to cross them. After going a part of the way he went upon the tracks and walked carelessly along one of them without looking back. The engine by which he was struck had stopped at a switch to await the passage of a freight train in the opposite direction from that in which the deceased was going. When it passed, the engine moved on, slowly ringing the bell, although deceased did not seem to hear it. Thinking the deceased would step off the track as others were doing, the engineer did not try to stop until within one and a half car lengths from him when he used his best efforts to do so. Other persons tried to warn the deceased of his danger, but without result. Extraordinary precautions had been taken by the defendant's servants during the day to prevent accidents. The court overruled a demurrer to the evidence. *Held*, that deceased's own negligence was the proximate cause of the injury, and that the demurrer should have been sustained. *Norfolk & Western R. Co. v. Harman (Va.)*, 8 S. E. Rep. 251.

Persons on Track—Implied Licence.—As to the liability of railway companies to persons using track under an implied licence. See *Troy v. Cape Fear & Y. V. R. Co.*, and note, 34 Am. & Eng. R. R. Cas. 13, 20; *Virginia Midland R. Co. v. White's Admr.*, 34 Ib. 23; *St. Louis, A. & T. R. Co. v. Crosnoe*, *post*, p. 313.

ST. LOUIS, ARKANSAS AND TEXAS R. CO.

v.

CROSNOE.

(Texas Supreme Court, November 23, 1888.)

Persons Crossing Track—Implied Licence—Liability.—If persons are accustomed to cross a switch track in a railroad yard without objection from the company, the railroad company must use reasonable diligence to prevent accidents to persons crossing, and will be liable for injuries to a person crossing the track caused by sending cars swiftly along it without any one at the brake.

APPEAL from District Court, Smith County.

Action against the St. Louis, Arkansas & Texas R. Co. to recover damages for personal injuries sustained by the plaintiff, H. C. Crosnoe. The defendant appeals from a judgment for the plaintiff.

N. Webb Finley for appellant.

John M. Duncan for appellee.

WALKER, J.—This is an appeal from a judgment in favor of Crosnoe for personal injuries inflicted upon him May 23, 1887, at Corsicana, Texas, by a moving car on the railway track of defendant running upon the plaintiff while he was crossing the track at a public highway. Statement of case.

The defendant answered that the "defendant company had a yard upon which was constructed sidings and switches for the exclusive purpose of switching car from the main track, changing cars, and making up trains; that this yard is located at a point where its sidings and switches do not intersect or cross any street, alley, or public way of travel, and that no person has a legal right to enter upon or cross over defendant's railroad at such point, so exclusively appropriated by it for switching purposes; that it is necessary and proper for the conduct of its business at Corsicana for it to have and maintain such a yard, etc.; that upon one of its sidings or switches in said private yard some flat cars had been placed, and, while an engine was being used to effect a coupling, . . . in the usual and ordinary manner, at usual rate of speed, one of the cars being moved was forced against said flat cars, moving them from their position some four or five feet, thereby passing upon the plaintiff; . . . that plaintiff was a trespasser, having entered upon the track at a point where he had no legal right to do so, and by his own wrong, without fault of the defendant company, brought

upon himself the injury," etc. By supplemental petition it is alleged "that there were cars standing upon the side tracks of defendant at or near the scene of the accident, and also a coal chute or bin, constructed between the said side tracks, all of which tended to and did obstruct plaintiff's view, so that he could not see the moving cars which were run against those which struck plaintiff until they were almost upon him; that the place where the accident occurred was in the midst of the city of Corsicana, and at a place in defendant's track commonly used by footmen; that same had been for years and is now notoriously used by the public as a crossing for foot-passengers going from East Corsicana to West Corsicana, and returning; that said defendant at all times, as well as its agents and servants, operating train in Corsicana, well knew of such open, notorious, and constant use of said place as a crossing by the public, and prior to said accident had made no objection thereto."

There is no contest over the fact and the extent of the injury, or as to the manner the same was caused. There was a contest as to the extent and publicity of the use of the place as a way by footmen in passing east and west between the two parts of the city of Corsicana, and some dispute as to the care taken by plaintiff in the act of attempting to cross the track. The counsel for defendant, by carefully prepared instructions requested, but which were refused by the court, sought to have the jury charged that the plaintiff, being in the yard and upon the track, not upon a street or public crossing, was a trespasser, and that under such circumstances he could not recover, unless the employes had seen his danger, and negligently permitted him to be injured, or had neglected to use due efforts for his safety after seeing his danger. The court charged the jury, among other things: "A person who goes upon a railroad track other than at a public street or crossing, or such private way as is commonly used by the public with the knowledge and permission of the company operating the track, is a trespasser, and the railroad company has a right to expect that the person will leave the track, and would not be held liable unless, after seeing the impending danger, they took no precautions to prevent injury; and, if they took precautions after seeing the danger, the railroad company would not be liable. (8) So that . . . if you find from the testimony that plaintiff, Crosnoe, went upon the track of the defendant, at a place other than at a public crossing, or private way that was commonly used by the public, and the company's agents knew that fact, and permitted it, he would be a trespasser, and, though the company may have acted negligently, yet the plaintiff cannot recover unless, after seeing his peril, the agents and employes of defendant failed to use precautions to prevent the injury. If they did see his danger, and did

**Instruc-
tions.**

not try to prevent the injury, then the plaintiff's negligence would not be the cause of the injuries, and you will find for plaintiff. Yet, though you may find that plaintiff was a trespasser, still, if the proof shows that defendant's agents knew that people were in the habit of crossing the track at the place where Crosnoe was injured, if you further find that defendant's agents and employes, knowing that people were in the habit of crossing the track at that point, in a reckless and wanton manner propelled the cars in such a way as to show a total indifference to the consequences of such act, and that the plaintiff was injured by such wantonness, then the defendant company would be liable. (9) Plaintiff cannot recover if he did not use his senses to ascertain the approach of a train; and if he went upon the track without acquainting himself of the approaching train, and was injured thereby, he cannot recover, unless, after he got upon the track, the agents of defendant saw him in time to try to use the means to avoid the danger, and failed to do so. If, however, the proof shows that Crosnoe went to a place that was a private way over defendant's road, commonly used by persons on foot, and that this fact was known by defendant's agents and employes in charge of the trains; and if the proof further shows that, before he went upon the track, he used the utmost care to find out if a train was approaching, and by the exercise of this care he did not know of an approaching train, and started across the track; and the defendant's agents and employes, knowing that this was a private way, did not use ordinary care, before explained, to prevent injury, and negligently ran their cars over plaintiff; and the proof further shows that plaintiff used that degree of care required of him, and was not negligent in going upon the track, and he was injured thereby, the defendant company would be liable. . . . If the place where plaintiff attempted to cross the track was not a private way, commonly used, the plaintiff, in going upon the track, would be a trespasser, and the defendant company would not be liable if they run over him, unless their agents and employes saw him in time to prevent the injury, and failed to do it. But if it was commonly known to the defendant company that people were in the habit of crossing at this point, and though plaintiff had no right to be upon the track, but was not guilty of negligence in trying to cross the track, and defendant's agents and employes propelled their cars forward and over him in such a reckless and wanton manner as to show a disregard to the consequences of their act, and plaintiff was injured thereby, without fault on his part, the company would be liable."

Examining the statement of facts, it is apparent that there was testimony that the plaintiff, before stepping upon the track, both looked and listened, thus using great care; that the attempt to cross was not at a street crossing or other public way; and that

it was upon a side track used by the defendant company in its business. The investigation is narrowed down to the enquiry as to the duty of the defendant, under the circumstances

Facts. attending the act complained of. It is not insisted upon that the employees did see the plaintiff, nor that they could have seen him from the positions they are shown to have occupied at the time; nor is it insisted that the place was at a street crossing or other public highway, nor is such a user of the crossing shown as amounted to the right of way by foot passengers to cross the track of the company against its orders or obstruction, if it had been interposed; nor is any express licence or consent claimed. It is, however, alleged that the place of the attempted crossing was "in the city of Corsicana, and at a place in the track commonly used by footmen in going from the east to west parts of the city, and in returning, and that the use was notorious, and well known by the company, its agents or employees." The testimony shows such use common and continuous; that a footpath had been worn by the passing at the place; that such use was known to the agents and employees of the defendant company; and that no protest or orders otherwise had been made against such use, nor any efforts to guard the passers-by from the dangers of the passage. It was shown that the work engaged in upon the switch track was part of the ordinary daily task of the employees, and was not dangerous to those engaged therein. It is shown that the bell of the engine was ringing at the time that the engine pushed three cars upon the switch towards the car which ran upon the plaintiff, and when at some distance from it the engine was detached and run back, the three cars by their momentum running to and striking the car next to plaintiff, and pushing it a distance from five to twelve feet, against and upon the plaintiff, inflicting the injury. One man was upon the detached cars, but he was not at a brake, nor in a position to check the cars, had danger been noticed. This hand did not see plaintiff, nor could he have seen him from his position before the collision. It was shown that the employees did not keep an outlook upon the switch track, expecting the way to be clear. The application to this condition of facts in the charge was that "if the agents and employees in a dangerous and reckless manner propelled the cars in such a way as to show a total indifference to the consequences of such act, and that the plaintiff was injured thereby, the defendant company would be liable;" and again, if they did not use ordinary care to prevent injury, and negligently ran their cars over plaintiff, etc., the company would be liable.

Our courts have held that a railroad company owes no duty to one who makes a highway of a railroad track, and is injured by a train upon it. *Houston & T. C. R. Co. v. Richards*, 59 Tex. 377; 12 Am. & Eng. R. R. Cas. 70. This must, however, be sub-

ject to a higher principle, protecting the life and limb even of a vagabond. "A high degree of care is necessary on the part of a railway company in operating its trains on any part of its road." *Galveston C. R. Co. v. Hewitt*, 67 Tex. 479; *Hughes v. Galveston, H. & S. A. R. Co.*, 67 Tex. 598; 34 Am. & Eng. R. R. Cas. 66; *Shelby v. Cincinnati, N. O. & T. P. R. Co. (Ky.)*, 3 S. W. Rep. 157. In the case of *Houston & T. C. R. Co. v. Boozer*, 34 Am. & Eng. R. R. Cas. 63 (Austin term, 1888), it was held that where a boy ten years of age was killed by a train at the crossing of a foot path, leading from the thickly populated part of the city of Dennison to houses on the opposite side of the railroad track, it was a question for the jury, under the circumstances, to determine whether the railway company used that care which it should have used to guard persons against injury. While the case was an action for the death of a boy not of mature years, which fact entered into the decision, yet the principle is recognized that at such a crossing some outlook was imposed from considerations of safety to those passing upon it.

Acquiescence in use of crossing by public—Duty of company.

The extent and nature of the use of the way across the track in *Corsicana* in this suit was part of the basis for the action of the jury in passing upon the care which ought to have been taken by the company and its employees at and before the collision. If the facts were equivalent to an implied consent to the use, a licence may have been assumed by the public to exist, from which the act of crossing would not be an invasion of any right of the railway company, and not a trespass, so long, at least, as the work of the employees was not obstructed. As men were commonly passing, or likely to be passing, those operating the cars would know of the danger in turning loose a car or cars without control, at speed sufficient to inflict damage. While the railway company is entitled to the right of a clear track, and ordinarily its employees are not chargeable with the duty of looking out for trespassers, yet, when the facts show from the common use of a private way across the track that it is likely that men may be upon it, such fact cannot be ignored by the employees working upon and using the track, without being guilty of want of proper care for human life and safety, which may amount to recklessness, equivalent to wilful injury, if injury should result, and the negligence be gross. The same rule is recognized in *Byrne v. New York Cent. & H. R. R. Co.*, 10 N. E. Rep. 539, by court of appeals of New York. The opinion cites with approval from *Barry v. New York Cent. etc. R. Co.*, 92 N. Y. 289; 13 Am. & Eng. R. R. Cas. 615: "In that case it was held that, where the public for a series of years had been in the habit of crossing the railroad, the acquiescence of the defendant in the public use amounted to a licence or permission to

all persons to cross at that point, and imposed the duty upon it as to all persons so crossing to exercise reasonable care in the movement of its trains, so as to protect them from injury." This rule is recognized in *Updike v. Elevator Co.* 8 S. W. Rep. 779, by the supreme court of Missouri; and in *Nichols' Admr. v. Washington, O. & W. R. Co.* 5 S. E. Rep. 171; 32 Am. & Eng. R. R. Cas. 27; by supreme court of Virginia. In *Louisville & N. R. Co. v. Schuster*, 7 S. W. Rep. 875, Justice HOLT, of Kentucky court of appeals, said: "The degree of care to be exercised . . . must necessarily depend upon the location, and the circumstances of the case. At places not frequented by the public, either by right or the permission, express or implied, of the company, and in localities where people are not constantly passing about, and where they cannot reasonably be expected to be, those in charge of a train are not required by law to be on the lookout for them. In such cases the company is entitled to the exclusive use of its track, and those upon it are trespassers; and those in charge of a train are only required to avoid injury to them if they can do so upon becoming aware of their peril." Otherwise, where persons are shown to be constantly passing about and across the track, and may reasonably be expected to be. See, also *Louisville, N. A. & C. R. Co. v. Phillips*, 112 Ind. 59; *Chicago & E. I. R. Co. v. Hedges*, 105 Ind. 398; *Bellefontaine & I. R. Co. v. Snyder*, 18 Ohio St. 399.

Actionable negligence has been defined as consisting "in the case of persons who are not in a relation of privity, in the exercise of rights in a manner which is not according to the conduct of reasonable and prudent men in a like situation, and which results in injury to others." *Pierce*, R. R. 310. Applying this rule to the facts of this case, we cannot hold the verdict to have been wrong in finding that the turning loose of the cars in swift motion upon the switch track, where men were commonly passing or likely to pass, though not a street crossing or public highway, was actionable negligence; nor can we assent to the proposition urged by appellant, that persons crossing the switch track, under the circumstances, were entitled to no care for their safety from the employes in moving the cars, unless the danger should be seen. The following additional authorities have been examined: *Pierce*, R. R. 330, 332; *Patt. Laws*, §§ 204, 205; 1 *Thomp. Neg.* 448, 462; *Hoppe v. Chicago, M. & St. P. R. Co.* 19 Am. & Eng. R. R. Cas. 81; *McAllister v. Burlington & N. W. R. Co.*, 19 Am. & Eng. R. R. Cas. 108; *Galveston, H. & S. A. R. Co. v. Bracken*, 59 Tex. 74, 14 Am. & Eng. R. R. Cas. 691; *Houston & T. C. R. Co. v. Richards*, Id. 373, 12 Am. & Eng. R. R. Cas. 70; *Texas & P. R. Co. v. Lowry*, 61 Tex. 149; *Galveston C. R. Co. v. Hewitt*, 67 Tex. 479; *Hughes v. Galveston, H. & S. A.*

What
amounts to
negligence.

R. Co. 67 Tex. 595, 34 Am. & Eng. R. R. Cas. 66; Galveston, H. & S. A. R. Co. v. Ryon, 7 S. W. Rep. 687, 34 Am. & Eng. R. R. Cas. 30; Houston & T. C. R. Co. v. Boozer, 34 Am. & Eng. R. R. Cas. 63.

The judgment below is affirmed.

Licenses upon Track—Liability of Company.—A foot path was generally used by the people of a village to reach the railroad station, and, although such path was not a public way, its use was acquiesced in by the railroad company. The path crossed a transfer track, and cars were frequently separated at the point of crossing in order to enable the public to use it. Deceased left the station platform and walked a distance of about sixty feet towards the transfer track on which stood some six or seven box cars, two of which were separated at a point near the center from eighteen inches to three feet. The evidence was conflicting on the question whether this opening was over or near the path. He attempted to pass between these cars, but just as he passed between them a freight train moved down upon them, and when they were thrown together by contact with the moving train, he was caught between the bumpers and fatally injured. Whilst going from the platform to the transfer track the freight train was in full view and hearing of the deceased, and other persons who were not any more favorably situated than he, both saw and heard the train, and two of them attempted to warn him of his danger. It appeared that the train men were negligent in failing to keep a proper look-out and in not ringing the bell. *Held*, that as the deceased's contributory negligence was the direct cause of the accident, the plaintiff was not entitled to recover, notwithstanding the negligence of the defendant's employees. *Bertelson v. Chicago, Milwaukee & St. Paul R. Co. (Dak.)*, 40 N. W. Rep. 531.

Plaintiff attempted to cross the track of the defendant company at a point used by the public as a crossing without objection from the defendant, though it was not a public crossing. In his evidence he testified that he looked each way for a train and saw none. It appeared, however, that there was nothing to prevent his seeing the train for some distance if he had looked for it properly, and also that he was run over as soon as he stepped upon the track. *Held*, that although the train by which he was run over was being backed rapidly without any signal, the accident was the result of gross carelessness on his part, directly contributing to his injury and a nonsuit should have been ordered. *Marland v. Pittsburgh & Lake Erie R. Co. (Pa.)*, 16 Atl. Rep. 623.

Where a railroad company provides offices for the transaction of its business accessible from the public streets, the presence, in the freight yard of the company, of a person having business with such offices, is not a necessary incident of his business with the company. He is at best a licensee, towards whom the company owes no special duty. A person who had business with the freight department of a railroad company was struck by a car whilst he was standing on a track in a yard of the railroad company with his back toward the only direction from which danger could be apprehended. *Held*, that he is guilty of contributory negligence. *Diebold v. Pennsylvania R. Co. (N. J.)*, 14 Atl. Rep. 576.

In Illinois, the fact that a railroad company has, without objection, allowed the public to cross its tracks at a place which is not a public crossing, raises no duty on the part of the company towards such persons, and a person so crossing the tracks is a trespasser. The evidence showed that for a number of years the workmen in certain freight houses had been in the habit of walking upon the tracks of a railroad company in order to reach their homes for dinner by a shorter route and that this custom had never been prohibited by the railroad company. At the time the deceased was killed he was walking along the track or trying to cross it in a diagonal direction. *Held*, that the deceased was not authorized to walk upon the tracks by any implied permission of the railroad and must be regarded as a trespasser. *Blanchard v. Lake Shore & Michigan Southern R. Co. (Ill.)*, 18 N. E. Rep. 799.

In an action for the wrongful killing of a person by a railroad company, it ap-

peared that the deceased was walking on defendant's track upon a foot path used by the people of the neighborhood without objection from the railroad company. A train was approaching deceased, and when within 150 feet of him he crossed over diagonally to the side of the track and pursued his way on the end of the cross ties when he was struck and killed. He could have seen the train at a distance of a 1,000 feet from the place of the accident. *Held*, that the death of the deceased was caused by his own negligence and that a verdict for the defendant should have been ordered by the court, although the train was running at a higher rate of speed than was permitted by a city ordinance *Baltimore & Ohio R. Co. v. State (Md.)*, 16 Atl. Rep. 212.

See also *Troy v. Cape Fear & Y. V. R. Co.*, and note; 34 Am. & Eng. R. R. Cas. 13, 20; *Virginia M. R. Co. v. White's Admr.*, 34 Ib. 23; *Memphis & C. R. Co. v. Womack*, 84 Ala. 149, *ante*, p. 308.

KANSAS PACIFIC R. CO.

21.

WHIPPLE.

(39 Kan. 531.)

Person on Track—Evidence—Contributory Negligence.—In an action against a railroad company for recklessly and wantonly injuring a little boy nine years of age, who was on the track, and was run over by one of defendant's engines, it was error not to allow defendant to ask a witness, who was the fireman on the engine, and had testified to all the facts, whether the boy had ample time to get off the track after the engineer blew his danger whistle before he was struck by the engine.

Same—Contributory Negligence—Duty of Company.—The fact that one has carelessly put himself in a place of danger is generally not an excuse for another to recklessly or wantonly injure him.

Same—Wanton Injury.—Where a little boy nine years of age was wrongfully walking upon the track of a railroad company, and his presence was discovered in ample time to prevent his being injured, the company owed to him the duty not to recklessly or wantonly run over him after his situation was perceived. In such a case, the liability of the company must be measured by the conduct of its employees on the train or engine after they became aware of the boy's presence upon the track. After his presence was discovered, if the engineer recklessly or wantonly runs the train or engine upon him, without doing what he reasonably could to stop and avoid the injury, the company is liable.

Same—Infant—Intelligence.—The rule of law in regard to the negligence of an adult and the rule in regard to that of an infant of tender years is quite different. By the adult there must be given that care and attention for his own protection that is ordinarily exercised by persons of intelligence and discretion. If he fails to give it, his injury is the result of his own folly, and cannot be visited upon another. Of an infant of tender years less discretion is required, and the degree depends upon his age and apparent knowledge.

ERROR to District Court, Douglass County.

J. P. Usher, Chas. Monroe and A. L. Williams for plaintiff in error.

Byron Sherry and Thos. P. Fenlon for defendant in error.

HORTON, C. J.—This was an action brought by Edwin Whipple, an infant, by his next friend, Frank B. Whipple, against the Kansas Pacific Railway Company, for damages alleged to have been caused by running an engine carelessly, recklessly, and wantonly over and upon him. His arm was mashed, his leg crushed and his head badly cut. His arm was subsequently amputated. The action was tried before the court and a jury. Judgment was rendered in favor of the plaintiff, and against the defendant, for the sum of \$7,500, and costs. The defendant brings the case to this court, and asks for a reversal of the judgment. The facts of the case, as found by the jury, are as follows: **Facts.**

Edwin Whipple at the time of his injuries, August 2, 1879, was in his ninth year, and deaf and dumb. He lived with his parents in the east part of North Lawrence. His father was a shoemaker, and had resided at the same place in North Lawrence for about 12 years. His shop was nearly opposite the railroad depot. On the morning of August 2, about 9 o'clock Edwin and his mother stopped in his father's shop to rest on their way home. He went from his father's shop, along the sidewalk on Locust street as far as the L., L. & G. crossing, in charge of his mother. Then, at his mother's direction, he went into Dicker's store after candy. From there he went upon the track of the railroad, and followed his mother down the track. His mother directed and expected him to follow her, but did not mention any track upon which he was to go. After Edwin came upon the railroad, he passed along between the rails for some distance before he was struck by the engine. He could have seen the engine approaching him from behind if he had looked. A short time before he was run over, Mr. Tudhope, having authority from the railroad company, directed Kennedy, an engineer operating a locomotive, to take Mr. Mallison, one of the company's employes to his home east of the depot, near Bismark, upon the engine. The engine was then standing on the first side track south of the main track in the yard of the railroad company, a short distance east of the depot. The engineer ran his engine and tender west over the switch at the depot platform, so as to get on the main track, and then started east on the track towards Bismark. He stopped his engine opposite or near the carpenter shop of the railroad company, and took Mallison on board, and then he started toward Bismark. The engine was moving backward, the tender being in front, as it proceeded east on the main track. It was 796 feet from the place where Mallison got on the engine to Main street or Dicker's crossing. The boy was struck by the engine 769 feet from the Main street crossing, but there was no street crossing at the place. The bell of the engine was rung at starting, but ceased at some point between the carpenter shop and Dicker's crossing. The whistle was

sounded upon the engine about 45 or 50 feet from the boy before he was struck. Neither the engineer, or anybody else on the engine, knew who the boy was that they were approaching on the track, nor did they know that the boy was deaf. The engine was running at the rate of twelve miles an hour. The engineer shut off the steam on the engine at or near the Main street crossing. The plaintiff's mother knew that engines and trains were frequently passing along the railroad where her boy was struck. There was a travelled way for teams and wagons along the south side of the track where the boy was struck, where he could have walked without being between the rails. There was also a path along the side of the track, where the boy could have walked without going between the rails. There was also one or more travelled streets by which the boy and his mother could have gone from Dicker's store to his home without passing upon the track at all. The boy, by reason of his deafness, was unfit to pass along the railroad tracks, or to be in places of danger unattended. His mother was aware that, on account of his infirmities, he was unfitted to be in places of danger. In the discharge of her parental duty, it was the duty of the mother to attend and see that her boy was not exposed to danger, and that he should not go, by himself, in places of danger. The jury also returned the following special findings of facts: "Could the injury to the plaintiff have been avoided by the exercise of reasonable care upon the part of the employes, considering all the surrounding circumstances? Yes. Was not the injury inflicted by and through the reckless and wanton neglect of the employes in charge of the engine? Yes. Were such warnings given by the employes of the defendant on the engine as would have enabled plaintiff to have known of the approach of the engine in time for him to have left the track if he had not been deaf? No; not one of his years and discretion. Did not the engineer, as soon as he suspected and apprehended that the plaintiff did not or would not heed the signals, reverse his engine, and attempt to stop it? His signal was not given in time to ascertain the intention of the plaintiff."

On the part of the plaintiff the testimony of Jones, Evans, and Titus was to the effect that the engine which struck the boy was going from 20 to 25 miles an hour, and that no bell was sounded or whistle blown. The testimony of Kennedy, the engineer, was: "I first saw a boy walking on the track a little east of the tool house. The tool house is two hundred or two hundred and fifty feet east of the crossing on Main street, which is the street that goes by Dicker's store. I was at the Main street crossing when I first saw the boy. The bell was ringing all the time from the time we started from the carpenter shop. When I was within about one hundred and fifty feet of the boy, I sounded the whistle, giving four or five successive blasts. As I got nearer to him,—

say from thirty to forty feet,—I was afraid he was not going to get off the track, and whistled again, and at the same time reversed the engine. It usually takes three motions to reverse the engine, but in this case it took two motions only, as I had shut off the steam about the Main street crossing, and the two motions were made in an instant. The speed of the engine was about six miles an hour before I shut off steam. After that it gradually decreased until I reversed the engine, but it would not decrease very much in that distance. After I reversed the engine, it went about one hundred feet before it stopped. As soon as it stopped, I got off the engine, and went to the boy. He was lying on the track about ten feet west of the engine; that is, the tender and engine had gone over him, and passed ten feet beyond. I should think that the engine and tender were fifty feet long. Of course, if I had known the boy was deaf, I could have stopped the engine after I saw him, but I did not know the boy, nor know he was deaf and dumb. I thought he was large enough to understand the signals. Until I whistled the second time, and reversed the engine, I had no reason to suppose that he did not hear the first whistle and the bell, and thought that he intended to stay on the track until the engine got most to him, and then jump off, as boys of his size had frequently done before, along the track." The testimony of Mallison was: "After the engine came down and stopped, I got on, and Mr. Tudhope gave the engineer orders to take me home. We went leisurely along,—about six miles an hour. I was standing partly on the engine, and partly on the tender, with my face towards Bismark. As we were passing down we saw a boy on the track, about five hundred feet ahead of us. The bell was rung for the crossing, and rung until we got over the crossing. I think we rung the bell at the crossing the second time, and blew the whistle. I supposed the boy would get off the track. I did not know him. Judging him as he appeared to me while standing on the engine, he was of sufficient size to apprehend danger signals. I heard the whistle. Kennedy blew the whistle near the boy when he saw the boy was not going to get off. He blew several whistles in succession sharply. We were from two hundred and fifty to three hundred feet from the boy when the whistle was blown. The engineer reversed the engine when he saw the boy was not going to get off. By throwing the engine over, he arrested its passage. It stopped after going over the boy. It passed over him about ten feet; and I think we were from two hundred to two hundred and fifty feet from the boy when I observed the engineer reversing the engine." The testimony of William Dillon was: "I was fireman on the engine that ran over the boy. Mallison, about opposite the carpenter shop, came along with his carpet satchel; and after we had fixed the cars, and he said he was ready to go, he got on

and I rung the bell, and we started. I attended to ringing the bell and to minding the street crossings. I let go the bell rope to attend to the fire and Kennedy sounded the whistle, for then there were several going along the track. We noticed the boy some distance ahead,—some two or three hundred yards. We run on down. We whistled for the boy, and rung the bell. He did not seem to pay any attention, and so we tried to stop the engine; but, before we could stop, it ran over the boy. The engine was about at the crossing when we saw the boy,—about six hundred feet or a little more. The engineer whistled for the crossing. After he passed the crossing he gave three whistles. They were danger whistles. I think the engine was making between eight and ten miles an hour; and we were about forty or fifty feet from the boy when the danger signals were sounded."

The following questions were asked by the defendant of Dillon: "*Question.* Were these whistles danger whistles? *Answer.* They were; yes, sir. That is what they are called. Q. Was there time, after giving these last whistles for the boy to get off the track? [Objected to by plaintiff as irrelevant, and incompetent. Objection sustained, and defendant excepted.] Q. You don't recollect where he was when he reversed his engine? A. No, sir. Q. Was it after he blew the danger whistle? A. Yes, sir. Q. And that was ample time for the boy to get off if he had heard you? [Objected to by plaintiff as incompetent, irrelevant, and immaterial. Objection sustained, and defendant excepting.]" The evidence was not only admissible, but important. It was therefore error not to allow the defendant to ask witness the questions objected to. The careless, reckless, and wanton conduct of the defendant in running its engine and tender over the track where the boy was injured, as specially alleged in the petition, was the "rate of speed of the engine at twenty miles an hour, without giving any notice or warning, by the ringing of the bell or blowing the whistle, or otherwise, of its approach, while the back of the plaintiff was towards the engine." For some reason, the jury disregarded most of the evidence of the plaintiff, and also most of the evidence of the defendant, as to the rate of speed of the engine and tender, and also as to the place where the bell was rung and the whistle sounded. Instead of finding that the engine was going at a speed of 20 to 25 miles an hour, as testified to by Jones, Evans, and Titus, or from 6 to 8 miles an hour, as testified to by Kennedy and Mallison, they made the finding that the speed of the engine was 10 or 12 miles an hour. Again, instead of finding that no bell was rung or whistle sounded, as testified to by Jones, Evans, and Titus, they found the bell was rung at the starting of the engine, but ceased at some point before it reached Dicker's crossing; and that the whistle was sounded upon the engine about 45 or 50 feet from the boy before he was struck.

The testimony of Dillon was that the engine was running upon the track from 8 to 10 miles per hour, and that the engine was about 45 or 50 feet from the boy when the danger signals were sounded. The jury accepted his testimony as the more truthful account of the transaction than that of the others. At least, the finding of the speed of the train, and the place where the whistle was blown, are more in accordance with his testimony than that of the other witnesses. Having given such a preference to Dillon as to the correctness of his testimony, the refusal to permit the witness to answer the questions asked and objected to is the more serious because the jury specially found that the signals of the engineer were not given in time. In the case of *Quinn v. New York, N. H. & H. R. Co.*, 12 Atl. Rep. 97, a somewhat similar question was ruled upon. LOOMIS, J., speaking for the court in that case said: "Assuming that the answer involved an opinion, it was clearly admissible; for, in the time required for such sudden movements as are referred to, it would be impossible to estimate in minutes or seconds with any approximation to accuracy; but every observer familiar with the running of trains and hand cars, as this witness was, would carry in his mind, though unconsciously, the measure of time required for jumping from the car as compared with the time it took the train, after it was discovered, to reach the place of collision. In strictness, we doubt whether such evidence should be considered matter of opinion. It would seem to be rather matter of fact, discernible by judgment or estimate. If the mental process be analyzed, it would seem to involve just as much a matter of opinion had the question been how long it would have taken to jump from the hand car, and how long it took for the train, after its discovery, to reach the place of the accident." See also *State v. Folwell*, 14 Kan. 105; *City of Parsons v. Lindsay*, 26 Kan. 426. The court had previously admitted similar testimony to that objected to as to a signal 150 feet from the boy; and it was more important to admit such testimony where the signal was not given until the engine was within 40 or 50 feet of the boy.

Further, as we read the instructions, they contain much surplusage, and were therefore misleading and confusing. All the facts in this case are embraced in a narrow—very narrow—compass. The petition alleged that the defendant "did recklessly and wantonly run upon the little boy, and injure him." No liability is charged or claimed against the defendant in consequence of common or ordinary negligence. The plaintiff was not entitled to recover, and cannot recover, unless he was recklessly or wantonly run over. The negligence of the mother has nothing whatever to do with the case. If she had fastened her little boy upon the track, instead

Refusal to
permit
fireman to
answer
questions.

Duty to boy—
Reckless or
wanton
injury.

of leaving him unattended, and if his presence there was known to the engineer upon the engine, he would have had no right to recklessly or wantonly run over him. It is admitted that the boy was walking upon the railroad track in the yard of the defendant, and was injured at a place where there was no public crossing. It is also admitted by the defendant that its employes upon the engine saw the boy upon the track as the engine was about crossing Main street. This was 769 feet from where the boy was struck. Conceding that the plaintiff was wrongfully upon the track, and that no duty arose in his favor until his presence was discovered, nevertheless the defendant owed to him the duty not to recklessly or wantonly run over him after his situation was perceived. The liability of the defendant must therefore be measured by the conduct of its employes on the engine after they became aware of the boy's presence upon the track. It is not claimed that they failed to discover him. After his presence was discovered, if the engineer recklessly or wantonly ran the train upon him, without doing what he reasonably could to stop and avoid the injury, the defendant is liable. As the engineer exercised control over the movements of the engine, it was incumbent upon him, after he saw the boy upon the track ahead of the engine, to use reasonable care to avoid doing him any injury. The fact that one has carelessly put himself in a place of danger is never an excuse for another recklessly or wantonly injuring him. *Kansas Cent. R. Co. v. Fitzsimmons*, 22 Kan. 686; *Kansas City, F. S. & G. R. Co. v. Kelly*, 36 Kan. 655; *Union Pacific R. Co. v. Dunden*, 37 Kan. 1; *Morris v. Chicago, B. & Q. R. Co.*, 45 Iowa 29; *St. Louis, I. M. & S. R. Co. v. Monday*, 4 S. W. Rep. 782; 31 Am. & Eng. R. R. Cas. 424; *Bouwmeester v. Grand Rapids & I. R. Co.*, 31 Am. & Eng. R. R. Cas. 376.

This case should have been tried, and, upon another trial, must be tried, upon the part of the plaintiff, as if the boy was not deaf and had not lost his power of speech, because it is clearly shown that the defendant, and all of its employes upon the engine, had no knowledge or notice of the infirmities of the boy until after he was struck. If, in this case, the plaintiff were an adult, we might, perhaps, say, as a matter of law, upon the facts disclosed upon the trial, that he could not recover. *Mason v. Missouri Pacific R. Co.*, 27 Kan. 83; 6 Am. & Eng. R. R. Cas. 1; *Union Pacific R. Co. v. Adams*, 33 Kan. 427; 19 Am. & Eng. R. R. Cas. 376; *Clark v. Missouri Pacific R. Co.*, 35 Kan. 350; *Finlayson v. Chicago, B. & Q. R. Co.*, 1 Dill. 579. But the party injured was not an adult. He was only a little boy, in his ninth year of age. "The rule of law in regard to the negligence of an adult and the rule in regard to that of an infant of tender years is quite different. By the adult there must be given that care and attention for his own protection that is ordinarily exercised by persons of intel-

ligence and discretion. If he fails to give it, his injury is the result of his own folly, and cannot be visited upon another. Of an infant of tender years less discretion is required, and the degree depends upon his age and apparent knowledge. Of a child of three years of age less caution would be required than of one of seven, and of a child of seven less than one of twelve." *Washington & G. R. Co. v. Gladmon*, 15 Wall. 402. As the engineer knew of the presence of the boy upon the track as the engine was about crossing Main street, and as he must have known, when he saw him, that he was a boy of tender age, and not so capable of taking care of himself as an older person or an adult, he should have brought to bear, for the safety of the boy and his undeveloped judgment, the exercise of adult judgment and caution to prevent his being run over. If the boy had not been seen by the engineer upon the track, or if he had been seen too late to avert the accident, then an entirely different question would be presented for our determination.

Counsel for defendant contend that the words "carelessly, recklessly, and wantonly," alleged in the petition, are not words synonymous with "purposely and wilfully." Therefore that the plaintiff in his pleading intended to charge the defendant with negligence only, and that the plaintiff cannot recover because of his contributory negligence. They insist that, unless the defendant purposely or wilfully ran upon the plaintiff with its engine, plaintiff cannot recover because he voluntarily exposed himself upon the track in a place of danger. There is a distinction between ordinary negligence and recklessness and wantonness, as defined in our decisions. A party may recover for the reckless or wanton conduct of another, or, as we have said, "for gross negligence amounting to wantonness," without a formal and direct intention to injure any particular person. Mr. Bishop says: "There is little distinction, except in degree, between positive will to do wrong and an indifference whether wrong is done or not. Therefore carelessness is criminal, and, within limits, supplies the place of direct intent." 1 Crim. Law, 20. Judge COOLEY says: "Where the conduct of the defendant is wanton and wilful, or where it indicates that degree of indifference to the rights of others which may justly be characterized as recklessness, the doctrine of contributory negligence has no place whatever, and the defendant is responsible for the injury he inflicts, irrespective of the fault which placed the plaintiff in the way of such injury." Law of Torts, 674. Mr. PIERCE says: "A railroad company has no right to inflict wanton injury on persons who are unlawfully on its location; and, where human life and limb are concerned, that injury may well be treated as wanton, subjecting the company to damages, when, although able to do so,

Same—
Allegation
in petition—
"Wanton-
ness" and
"reckless-
ness."

they neglect to arrest the engine, which they have good reasons to believe will, without an effort to stop it, result in injury to the wrong-doer. A wrong-doer is not necessarily an outlaw as to his property; still less as to his person." On Railroads, 330. Recklessness "is an indifference whether wrong is done or not,—an indifference to the rights of others." Wantonness "is reckless sport; wilfully unrestrained action, running immoderately into excess." "Whoever exercises slight care, and no more, is guilty of ordinary negligence: whoever exercises less than slight care is guilty of gross negligence, and may be guilty of wilful and wanton wrongs." Union Pacific R. Co. v. Rollins, 5 Kan. 167. In popular use and by our decisions, "recklessness" and "wantonness" are stronger terms than mere or ordinary negligence, and therefore, if a person recklessly or wantonly injures another, such person may be subject to damages, even if the other party has been guilty of some negligence or is a trespasser. In *Pierce, R. R., supra*, it is said: "A person entering without right on a railroad company's track does so at his peril, and cannot recover for injuries suffered by him in a collision with its engines except when it inflicts them intentionally or wantonly." In *Bouwmeester v. Grand Rapids & I. R. Co.*, 34 N. W. Rep., *supra*, the opinion, referring to a former case, uses the following language: "That case was decided expressly upon the ground that the engineer, knowing that the whistles and bells were not sufficient to warn Brandel of his danger, and being able to stop his train before reaching him, ran recklessly and heedlessly upon him. In such case the contributory negligence of the deceased would not avail against the criminal conduct of the engineer." In *Missouri, K. & T. R. Co. v. Weaver*, 16 Kan. 456, Mr. Justice BREWER said in the opinion: "The expulsion may have been wrongful, but it does not seem to have been wanton." In *Kansas Pac. R. Co. v. Kessler*, 18 Kan. 523, the same judge, in the opinion, said: "There was such gross negligence on the part of the railway company, such wanton and reckless disregard of the rights of the defendant, as to justify mulcting it in the damages allowed." *Mason v. Missouri Pacific R. Co., supra*, the railway company was not guilty of gross or wanton negligence; and this court said that the plaintiff in that case could not cover because the negligence of the company did not amount to wantonness. See also *Palmer v. Chicago, St. L. & P. R. Co.*, 14 N. E. Rep. 70; 31 Am. & Eng. R. R. Cas. 364, for comments upon wilful, reckless, and wanton acts.

There are various other matters discussed in the briefs, but it is unnecessary to deal with them.

The judgment of the district court will be reversed.

All justices concurring.

Infant—Negligently Killing.—Deceased, a boy of nine years of age was last seen by his father a little more than a quarter of a mile from his home walking upon the tracks. At that time he was moving in the direction of his home, which he ought to have reached in the course of a quarter of an hour. An hour and a half after deceased was seen, a heavily loaded freight train passed, carrying a bright head light and making a noise that could be heard at a distance of a mile. The next morning the mangled remains of the boy were found on the track 150 or 200 yards from a crossing. Several witnesses testified that they saw blood on the track and at a distance variously estimated by them of from 15 to 40 yards from the crossing. Contrary to the usual custom, no bell was rung or whistle blown by the freight train when it passed the crossing. There was no witness to the actual death of the boy, nor was there anything to show that he had exercised due care. *Held*, that the evidence was insufficient to sustain a verdict for the plaintiff. *Missouri Pacific R. Co. v. Porter* (Tex.), 11 S. W. Rep. 324.

An action was brought to recover damages for the death of plaintiff's daughter, a girl nine years of age. At the time the girl was killed she was returning from school, and she with other children waited on the line of the track until an engine and cars attached to it had passed. Immediately after the engine and cars had passed, the deceased ran upon the track, attempted to cross it on her way home, when some cars which had become detached from the main train and which were running at the rate of about 18 miles an hour, ran over and killed her. The evidence showed that the train had been broken some 200 yards from the place of the killing; that the officers and agents of the company in charge of the train did everything in their power to prevent the accident after the train had become detached; but there was no evidence before the court as to any care or diligence on the part of the defendant or its employees to prevent the breaking of the train into two sections before it occurred. *Held*, that the evidence was insufficient to support a finding that the uncoupling of the train was the direct cause of the accident and that the defendant is therefore liable. *Galveston, Harrisburg & San Antonio R. Co. v. Chambers*, (Tex.) 11 S. W. Rep. 279.

Children Trespassing on Railroad Track.—See *Houston v. Vicksburg, S. & P. R. Co.*, 34 Am. & Eng. R. R. Cas. 76; *Reilly v. Hannibal & St. J. R. Co.*, 34 Ib. 81; *Chrystal v. Troy & B. R. Co.*, 31 Ib. 411, note 415; *Keyser v. Chicago & G. T. R. Co.*, 31 Ib. 399; 4 Am. & Eng. Encyc. of L. 53.

Contributory Negligence of Children.—See *Erwin v. St. Louis, I. M. & S. R. Co.*, 35 Am. & Eng. R. R. Cas. 390, note 394; 4 Am. & Eng. Encyc. of L. 42.

WILLIAMS *et Ux.*

v.

KANSAS CITY, SPRINGFIELD AND MEMPHIS R. Co.

(96 Mo. 275.)

Trespasser on Track—Duty of Company—Instruction.—Where, in an action to recover damages for negligently killing plaintiff's minor son whilst playing in the defendant's switchyard, it appears that there was no evidence that the defendant knew of the boy's presence or of his danger, it is error for the court to instruct the jury that the plaintiff can recover, although there was contributory negligence on the part of the deceased if the accident could have been prevented by reasonable care on the part of the railroad employes after discovering his danger.

Same—Switchyard.—Railroad employes are under no obligation to watch for and discover the presence of a boy playing in the company's switchyard.

Same—Infant—Wanton Injury—Sufficiency of Evidence.—A train composed

partly of box cars and partly of flat cars having come into defendant's depot, the switch engineer cut the flat cars loose and left them standing on the main track. He ran the box cars a distance of about a quarter of a mile intending to place them on a side track, but hearing a passenger train approaching, he reversed his engine, signalled the passenger train to come forward and ran his train back. As the box cars struck the flat cars, one of the latter ran over the boy. The boy, said after he was hurt that he was sitting on a brake at the time of the accident. The testimony showed that the box cars struck the flat cars harder than usual. The witnesses, with one exception, testified that they were running at from 6 to 8 miles an hour. The remaining witness testified that the train was running very fast, from 35 to 40 miles an hour. It appeared that the witness did not see the train and that he made his estimate of the rate of the speed from the noise occasioned by the jam. *Held*, that, as there was no obligation upon the company to anticipate the presence of the boy, there was no evidence of wanton injury nor was there any sufficient evidence of gross and reckless carelessness.

APPEAL from Circuit Court, Howell County.

Action by Joseph Williams and wife against the Kansas City, Springfield and Memphis R. Co. to recover damages for negligently causing the death of plaintiff's son. A verdict for the plaintiff for \$3,500 was returned. Defendant's motion for a new trial and in arrest of judgment having been overruled, it appealed.

Wallace Pratt and *C. B. McAfee* for appellant.

W. N. Evans and *Livingston & Pitts* for respondents.

BLACK, J.—The plaintiffs, who are husband and wife, brought this suit to recover damages for the death of their son, who was run over by defendant's cars, and killed, at the town of Augusta, also called Thayer. Plaintiffs kept a boarding house in the town, about 100 yards from the depot. The boy was intelligent, twelve years of age, and had been raised on and near railroads. A train of eight or ten box cars in front, loaded with ties, and several empty cars in the rear, came in from the south. Stuer, the switch engineer, took the train up opposite the freight depot. The flat cars were then cut loose, and left standing on the main track, and he ran the box cars north a half or a quarter of a mile, intending to place them on a side track; but before the rear car passed the north end of the switch he heard a passenger train coming from the north. He reversed his engine, signalled the passenger train to come forward, and ran his train back, and put the flat and box cars on the switch at the south end. As the box cars hit the flat cars one of the latter run over the boy. The petition alleges that the boy was killed at a crossing, and at a point opposite the freight depot; but the evidence shows that he was run over three or four hundred feet north of the street, which crosses the track, and at a point opposite the freight depot, where there is no crossing at all. Hazen, a witness for plaintiff, testified that he got on top of one of the box cars before they were run up to the depot; that he rode up to the north end of the switch, and that when the cars started

back on the main track the brakeman ran along on the ground, and signaled Suter to stop; that the brakeman then climbed up on one of the cars, and again signaled Suter to stop when within 300 feet of the flat cars, but Suter did not stop or check up. Hazen says he was nearer the flat cars than the brakeman, and that he did not see the boy. Several of the witnesses were at and near the freight depot, and they all say they did not see the boy on the car or track. One witness says the boy was on the flat cars when they were going up to the depot, but this witness did not see the boy at that place. It seems the boy said, after he was hurt, that he was sitting on a brake at the time of the accident. The witness Hazen, who was on the box car, "to pass away the time," as he expresses it, says there was danger from both ways, and that he jumped off, when within 100 feet of the flat cars, without being hurt; that Suter shut off steam before he struck the flat cars. He and other witnesses testified that the box cars struck the flat cars "at an unusual rate of speed;" "it was a harder jam than usual;" "cars seemed to bow up where coupled." Hazen says the jam broke the engine loose from the box cars. The proof is that the bell was ringing all the while, and the witnesses who testify as to rate of speed, with one exception, place it at six to eight miles per hour. Other evidence is to the effect that the jam was not of unusual force, and that the cars were not injured by it. There is evidence that Suter was often about saloons, and drank considerable; but there is no proof that he was intoxicated at the time of the accident, and the only witness that speaks of his competency says he was regarded as a careful engineer. There is evidence that plaintiffs got water for their boarding house from a spring, to reach which they had to cross these tracks; but there is no evidence that the boy was on any such an errand. He was three or four hundred feet north of the crossing by which the spring was reached.

The most important question in this case is whether the defendant's instruction asked at the close of the case, in the nature of a demurrer to the evidence, should have been given. This question will, however, be considered in the light of the second instruction given at the request of plaintiffs, which is as follows: "No. 2. That although the jury may believe from the evidence that the deceased, Charles Williams, was guilty of negligence by being on or about defendant's track or cars at or near its depot, yet if they further believe from the evidence that his death could have been prevented by the exercise of reasonable care on the part of defendant's servants and employes after discovery of danger in which the said Charles Williams stood, or if defendant's servants and employes failed to discover the danger in which said Charles Williams was

**Liability
notwith-
standing
boy's negli-
gence—
Instruc-
tion.**

at the time, through their recklessness and carelessness, when the exercise of ordinary care would have discovered his danger and averted the calamity, then the defendant is liable, and the jury should find for the plaintiffs." It must be kept in mind throughout this case that the boy, at the time of the accident, was on a car or the track in the defendant's switchyard, and that, too, without invitation or right. In short, he was a trespasser. The principles of law which are to be applied in cases of this kind are not to be confounded with those which are applied where the party is on the car or track by right, nor with those which regulate the duties of railroad corporations at public crossings, or where the company has violated some statutory or municipal regulation. It has been held in a number of cases, where the party injured or killed was wrongfully on a railroad track—was a trespasser—that, in order to make the defendant liable, it must appear that the proximate cause of the injury was the omission of the defendant to use reasonable care to avoid the injury, after becoming aware of the danger to which the injured party was exposed. *Isabel v. Hannibal & St. J. R. Co.*, 60 Mo. 475; *Harlan v. St. Louis etc. R. Co.*, 64 Mo. 480; *Zimmerman v. Hannibal & St. J. R. Co.*, 71 Mo. 477; 2 Am. & Eng. R. R. Cas. 191; *Yarnall v. St. Louis, K. C. etc. R. Co.*, 75 Mo. 583; 10 Am. & Eng. R. R. Cas. 726; *Maher v. Atlantic etc. R. Co.*, 64 Mo. 267. While the evidence shows that the brakeman when on the ground at the north end of the switch, and when on top of the car, signaled the engineer to stop, yet it is clear he gave the signal, not because he saw the boy on the car or track, but because he supposed the box cars were to be placed on the side track, and not run back on the main track. There is, indeed, nothing to show that either he or the engineer saw or knew that the boy was on or about the flat cars. Not a witness saw the boy on the car at the time of the accident, though some of them were in a more favorable position to see him than the brakeman. There is no evidence upon which to base a liability on the ground that the defendant's servants saw or knew of the danger to which the boy was exposed, and for this reason the plaintiffs' second instruction should not have been given. Indeed, the third instruction given at the request of the defendant told the jury that there was no evidence that defendant's servants saw or knew that he was on the car or track.

But it is necessary to examine the other branch of the plaintiffs' second instruction. The general rule of the authorities before cited implies that the engineer is not bound to foresee the wrongful presence of persons upon the track or cars. The rule, however, as before stated, will, in some cases, require a modification. It was said in case of *Harlan v. St. Louis etc. R. Co.*, 65 Mo. 22, that the company would be liable, though the

Duty of engineer to watch for and foresee presence of boy.

person injured or killed was wrongfully on the track, if the defendant failed to discover the danger through the recklessness or carelessness of its employes, when the exercise of ordinary care would have discovered the danger, and averted the calamity. This qualification of the general rule was, in substance, asserted in *Scoville v. Hannibal & St. J. R. Co.*, 81 Mo. 434; *Frick v. St. Louis, K. C. etc. R. Co.*, 75 Mo. 595; 8 Am. & Eng. R. R. Cas. 280; *Kelley v. Hannibal & St. J. R. Co.*, Id. 138. The reason for the application of this qualification of the general rule in the *Kelley* case is found in these observations, made in that case: "From all the evidence, it is by no means a forced deduction that, if the engineer and fireman had been at their proper places on the locomotive, and running with that care and watchfulness which is demanded of them in running through the streets of a populous city, they would have observed this man on the track." So, in the *Frick* case, the train was going through the suburbs of a city, across and between streets, and where there were dwelling houses on either side of the track. So if warning should be given to an engineer, and seen or heard by him, which a reasonably prudent person would understand to indicate danger ahead, then the company would be liable for his failure to take all reasonable precautions to avoid the danger; and this would be true whether in a city or town, or in a country district. *Donahoe v. Wabash, St. Louis etc. R. Co.*, 83 Mo. 543. After stating the general rule that an engineer is not bound to foresee persons wrongfully on the track, it has been said: "But it has been held that, if common experience has shown that persons or cattle are constantly upon the track, a recovery may be had for injuries suffered by them through the neglect of the engineer to look after them, even if he did not see them." *Shear. & R. Neg.* § 493. Thus it will be seen that cases may and do so arise where, though the company is entitled to a clear track, it cannot be fairly presumed that the track will be clear. A duty then arises to look out, and the liability is not limited to want of care after discovery of the danger. Instances of such cases have been given, and perhaps the rule cannot be generalized in better terms than that quoted from *Shear. & R.* It will be for the court, in the first instance, to say whether the evidence offered tends to present such a case. But where the company has a right to have, and has a right to anticipate, a clear track, there can be no reason or justice in predicating a liability of the defendant to one wrongfully on the track, on the ground that he might have been seen by the exercise of ordinary care. In such cases there is no duty on the part of the company to watch for him; and how can there be a liability for a failure to watch? The liability arises only from a breach of duty. The duty in such cases is only not to wantonly or with reckless carelessness injure any one, and that does not require the company to be on the

watch for trespassers. *Rine v. Chicago & Alton R. Co.*, 88 Mo. 392; 25 Am. & Eng. R. R. Cas. 545; *Hallihan v. Hannibal & St. J. R. Co.*, 71 Mo. 113; 2 Am. & Eng. R. R. Cas. 117. It seems to be sometimes supposed that, if the case can go to the jury on the ground of want of care after the danger is discovered, that the same evidence will call for a submission of the case on the other ground, namely, "or might have been discovered by the exercise of ordinary care;" but enough has been said to show that the supposition is not well founded. Now, in this case, the boy was on the track or car in the defendant's switchyards, not at or near a place where he had a right to be. These tracks were much used for the purpose of switching cars or making up trains, being at the end of the road divisions. The train had just gone to the north end of the switch; and, there being no evidence that the persons in charge of the train saw or knew that the boy was on the cars or track, they were not bound to foresee or anticipate his presence. It follows that the instruction is wrong as to the second branch or ground of liability.

The instruction just considered assumes that the boy was guilty of negligence; and the question remains whether the case should go to the jury on other and different instructions. If the boy used that care which may be reasonably expected from boys of his age and capacity, then he was not guilty of contributory negligence; and whether he did or not use that care is a question for the jury. So, if the defendant's servants saw him on the car or track, they could not presume that he would get out of the way or out of danger, as they might, under some circumstances, had he been a person of mature years and discretion. But assume that he was not guilty of negligence contributing directly to his death: the question is whether there is evidence of negligence on the part of the defendant's servants. As we have seen, they were not bound to be on the watch for him, and there is no evidence tending to show that they knew he was on or about the car. As said in the case of *Morrissey v. Eastern R. Co.*, 126 Mass. 377, where the action was brought by a child four years old, and who was on the track, but not seen by the engineer: "The plaintiff at the time of the accident was a mere intruder and trespasser upon the railroad tracks. No inducement or implied invitation to enter upon the tracks had been held out. He was neither a passenger, nor on his way to become one, but was there merely for his own amusement, and was using the track as a playground. The defendant corporation owed him no duty, except the negative one, not maliciously, or with gross, reckless carelessness to run over him." It is true that the evidence shows, or tends to show, that the box cars were set back against the flat cars with more than usual force; but it is an undisputed fact that

**Wanton
injury
to boy—
Evidence.**

the engineer was endeavoring to avoid, or not delay, the incoming passenger train, as it was his duty to do. There is no evidence of a wanton injury, and we can but conclude that there is no evidence of gross and reckless carelessness, lest it be that of witness Burner, which is as follows: "My livery stable is across the street from freight depot, and above the depot. I heard the jam together. I went over at once. Dr. Crider was not there. He was sent for two or three times before I saw him come. It was five or ten minutes after the boy was hurt. He came from town. The train that came backing and jammed the cars was ringing the bell very loud. It came very fast, and was running twenty-five to thirty miles an hour."

Cross-examined: "*Question.* Could you not drop off a mile or so from that rate? *Answer.* No; if I should change, I should put it faster than what I have stated. *Q.* If a train was running at thirty miles an hour, would a person get jammed or hurt in jumping off? *A.* It would depend upon what he lit on. I am not a railroad man. The train made noise as it came running back. I think I could have heard it two miles. Have heard trains sixteen miles." This witness appears to have been at his stable at the time of the accident, and the only inference from his evidence is that he did not see the cars when they came together. He heard the jam, and from that alone makes his estimate of the rate of speed—an estimate at war with all the other evidence in the case. While the rate of speed of an engine or car may be shown by the opinion of witnesses who saw the engine or car in motion, still such evidence seems to be admitted on the ground that the estimate involves the consideration of many circumstances which cannot be accurately or fully detailed. Hence the conclusion drawn by the witness from the circumstances is admitted. It is but the opinion of the witness. Such an opinion, formed by a nonexpert solely from hearing the jam of the cars, is of no value, and, we conclude, entitled to no consideration. The witness, if not an expert, ought to have before his mind and eye something more than the noise made by the jam of the cars to entitle his opinion of the rate of the speed of the cars to any consideration.

The judgment is reversed.

RAY, J., absent. NORTON and SHERWOOD, J. J., concur in the result. BRACE, J., concurs.

Injuries to Infant.—If the engineer tells a child seven years of age who was riding on the engine contrary to the rules of the company, to get off the engine whilst it is in motion and he is injured in doing so, the company is liable for his injuries whether he was on the engine by the engineer's invitation or not. An instruction that the plaintiff, a child of seven years of age, and the engineer in charge of the locomotive were fellow-servants, has no application in an action to recover damages for injuries to the plaintiff caused by his attempting to leave the engine whilst it was in motion in obedience to the direction of the engineer,

even though the plaintiff went upon the engine to ring the bell by request of the engineer and under the engineer's promise to pay him therefor. *Chicago, Milwaukee & St. Paul R. Co. v. West* (Ill.), 17 N. E. Rep. 788.

Plaintiff with a number of other boys got upon a car standing on a track laid on the levee of the Mississippi River for the purpose of viewing a boat race. The railroad employes backed an engine down, coupled it to the car and started up with it. The boys in the car were frightened by the starting and began pushing one another around in the car, and just as it rounded a curve, plaintiff was pushed off and fell under the wheels. *Held*, that the employes were not bound to anticipate plaintiff's presence in the car and that a demurrer to the evidence ought to have been sustained. *Curley v. Missouri Pac. R. Co.* (Mo.), 10 S. W. Rep. 593.

Contributory Negligence of Children.—See *Erwin v. St. Louis, I. M. & S. R. Co.*, 35 Am. & Eng. R. R. Cas. 390, note 394; 4 Am. & Eng. Encyc. of L. 42.

TWIST

v.

WINONA AND ST. PETER R. CO.

(*Minnesota Supreme Court, August 30, 1888.*)

Trespasser on Track—Contributory Negligence—Child.—A child of such tender years as to be incapable of exercising any judgment or discretion cannot be charged with contributory negligence. But where a child has attained such an age as to be capable of exercising his judgment and discretion, he is responsible for the exercise of such a degree of care and vigilance as might reasonably be expected of one of his age and mental capacity.

Same—Turn Table.—A boy of the age of nearly 10½ years, and of average intelligence, who had been frequently in the vicinity of a railway turn table, and had a general knowledge of its structure and operation, and had been repeatedly warned by his father that it was dangerous to play upon it, and told not to do so, and knew that the railway company prohibited children from playing on the table, and also knew that he had no right to play upon it, and that it was dangerous to do so, engaged with other boys in swinging upon it while in motion, and was injured by his foot being caught between the arm of the table and the stationary abutments. *Held*, that the conduct of the boy amounted to contributory negligence, although he might not have been of sufficient age and discretion to understand and comprehend the full extent of the danger to which his conduct exposed him.

APPEAL from District Court, Nicollet County.

Wilson & Bowers for Winona & St. Peter Railroad Company, appellant.

Lusk & Bunn for Frank Twist, respondent.

MITCHELL, J.—This action was brought to recover damages for personal injuries sustained by plaintiff's son while playing on one of defendant's turn tables. The table was situated upon defendant's own premises, in the suburbs of St. Peter, some five or six hundred feet from the depot. The premises were unenclosed, but the table was not so

near any highway or street as to interfere with the safety or convenience of public travel. It was what is called a "skeleton" turn table, of the kind in general use by railways except in round-houses. In accordance with the general usage, it was not locked, but was supplied with latches of the usual kind to keep it in place when in use. These latches weighed four or five pounds each, but could be lifted out of their sockets, and the table set in motion, by comparatively small children. Boys had been frequently in the habit of setting the table in motion, and playing on it, and during the fifteen or twenty years it had been there, three boys had been injured by it, all of which facts were known to the defendant. The agents of the railway company had frequently forbidden children from playing on the table, and were in the habit of driving them away when they saw them doing so. It does not appear but that some way might be devised of keeping such turn tables locked when not in use, but the evidence does show that no such contrivance has yet been devised, and that the general custom is to leave them unlocked and merely held in place by latches, as this one was. Plaintiff's son, a boy of the age of ten years and four months, went, in company with several other boys, into the vicinity of the table, and, after the others had set the table in motion, he also joined in swinging on it, and sustained the injuries complained of, in the usual way, by his foot being caught between the arm of the table and the stationary abutments. The negligence charged against the defendant is in not locking the table, so that it could not be set in motion by children.

The rule invoked by plaintiff is that laid down by this court in *Keffe v. Milwaukee & St. Paul R. Co.*, 21 Minn. 207, and by the supreme court of the United States in what may be termed the pioneer "turn table case" (*Sioux City & Pac. R. Co. v. Stout*, 17 Wall. 657), in which it is held that the owner of dangerous machinery, who leaves it in an open place, though on his own land, where he has reason to believe that young children will be attracted to play with it, and be injured, is bound to use reasonable care to protect such children from the danger to which they are thus exposed. The line of argument adopted in the "Keffe Case," in support of this rule, is that such machinery, being attractive to young children, presents to them a strong temptation to play with it, and thus allures them into a danger whose nature and extent they, being without judgment and discretion, can neither apprehend nor appreciate, and against which they cannot protect themselves; that such children may be said to be induced by the owner's own conduct to come upon the premises; that what an express invitation is to an adult, an attractive plaything is to a child of tender years; that as to them

**Duty and
negligence
of railroads
in care of
turn
tables.**

such machinery is a hidden danger—a trap. Much of the briefs of counsel, especially of that of defendant, is devoted to the consideration of the doctrine of these so-called “turn table” cases, and of the question of the duty, if any, which the owner of dangerous machinery or other articles situate on his own premises owes to intermeddling or trespassing children. The doctrine of these cases has been questioned by some courts, and repudiated by others, who hold that a land owner is not bound to take active measures to insure the safety of intruders, even children; nor is he liable for any injury resulting from the lawful use of his premises to one entering without right; that to intruders or trespassers the land owner owes no duty; and where there is no duty to perform there can be no negligence. *Frost v. Eastern R. Co.*, 9 Atl. Rep. 790. Applied to one of sufficient mental capacity to be a conscious trespasser, this is undoubtedly a sound rule; but if applied to children of tender years, strictly *non sui juris*, it would seem harsh and inhuman. Properly qualified and limited in its application, the doctrine of the Keffe case is, in our judgment, in accordance with both reason and the dictates of humanity. But some of the cases have undoubtedly gone too far. By adopting an extreme or extraordinary standard of duty on the part of the land owner on the one side, and on the other side by attributing the conduct of all children to their childish instincts so as to exempt them from the charge of contributory negligence, regardless of age or mental capacity, it is obvious that the rule of the Keffe and similar cases is capable of indefinite and unbounded applicability. To the irrepressible spirit of curiosity and intermeddling of the average boy there is no limit to the objects which can be made attractive playthings. In the exercise of his youthful ingenuity, he can make a plaything out of almost anything, and then so use it as to expose himself to danger. If all this is to be charged to natural childish instincts, and the owners of property are to be required to anticipate and guard against it, the result would be that it would be unsafe for a man to own property, and the duty of the protection of children would be charged upon every member of the community except the parents of the children themselves. This court itself, if it has not modified the Keffe case, has at least indicated that the doctrine which it announces is not to be given any such extreme and unlimited application. *Kolsti v. Minneapolis & St. L. R. Co.*, 32 Minn. 133; 19 Am. & Eng. R. R. Cas. 140; *Emerson v. Peteler*, 35 Minn. 481. It is unnecessary, however, to determine whether, upon the facts in the present case, the finding of negligence on part of the defendant can be sustained, inasmuch as it is clearly established by both the evidence and the special findings of fact that the boy himself was guilty of contributory negligence. The law

Contrib-
utory
negligence
of boy.

very properly holds that a child of such tender years as to be incapable of exercising judgment and discretion cannot be charged with contributory negligence: but this principal cannot be applied as a rule of law to all children without regard to their age or mental capacity. Children may be liable for their torts or punished for their crimes and they may be guilty of negligence as well as adults. The law very humanely does not require the same degree of care on the part of a child as of a person of mature years, but he is responsible for the exercise of such care and vigilance as may reasonably be expected of one of his age and capacity; and the want of that degree of care is negligence. The fact that he may not have the mature judgment of an adult will not excuse a child from exercising the degree of judgment and discretion which he possesses, or for disregarding the warnings and orders of his seniors, and heedlessly rushing into known danger. In the Stout case, the defendant made an express disclaimer of any contributory negligence on the part of the plaintiff. In the Keefe case, which was disposed of on the pleadings, this court said; "It was not urged upon the argument that plaintiff was guilty of contributory negligence, and we have assumed that he exercised as he was bound to do, such reasonable care as a child of his age and understanding was capable of using." And as was remarked in the Keefe case, in the cases cited in support of these "turn table" cases, the principal question discussed is not whether the defendant owed the plaintiff the duty of care, but whether the defendant was absolved from liability for breach of duty by reason of the fact that the plaintiff was a trespasser, who by his own act contributed to the injury; and the distinction is not sharply drawn between the effect of plaintiff's trespass as a bar to his right to require care, and the plaintiff's contributory negligence as a bar to his right to recover for the defendant's failure to exercise such care as it was his duty to use. But the authorities are all one way, and to the effect that even a child is bound to use such reasonable care as one of his age and mental capacity is capable of using; and his failure to do so is negligence. *Wendall v. New York Cent. etc. R. Co.*, 91 N. Y. 420; 14 Am. & Eng. R. R. Cas. 663; *Messenger v. Dennie*, 141 Mass. 335; *Chicago, R. I. & P. R. Co. v. Eininger*, 114 Ill. 79; *Brown v. European & N. A. R. Co.*, 58 Me. 384; *Achtenhagen v. City of Watertown*, 18 Wis. 331; *Masser v. Chicago, R. I. & P. R. Co.*, 68 Iowa 602; *Murray v. Richmond & D. R. Co.*, 93 N. C. 92; *Ludwig v. Pillsbury*, 35 Minn. 256; *Washington & G. R. Co. v. Gladmon*, 15 Wall. 401; *Gillespie v. McGowan*, 100 Pa. St. 144.

The evidence in the present case shows without conflict substantially the following facts: The boy was nearly 10½ years old, and of at least average intelligence. He had been at school since he was 6 or 7 years old. His father was a railroad man, in

the employment of the defendant around the yard and depot, and the boy had been frequently around the railroad grounds and the turn table with his father. He was evidently familiar, at least in a general way, with the working of the turn table, and the use of the latches. His father had repeatedly warned him against going on the turn table, and told him of the danger, and that he must not go on it. He evidently had quite a lively sense of the danger of playing on the table, and of the manner in which accidents were liable to occur to those swinging on it. The boy himself admits that he knew there was great danger of getting

hurt on it. He knew that playing on it was forbidden by the railroad company, and that if its agents saw children doing so they would drive them off. It is suggested that his motive of going to the table was to

try to induce the other boys to get off lest they might get hurt. But if he had such a realizing sense of their danger, so much the more inexcusable was it for him to go and do precisely what he knew was exposing them to danger. Upon this state of the evidence the jury, in addition to their general verdict, found the following facts in answer to the following questions

submitted to them: "First. Did Verne Twist, when he went to play on this turn table, on the day when he was hurt, know that it was dangerous? *Answer.*

Yes. Second. Did Verne Twist, when he went to play on this turn table on the day when he was hurt, know that he had no right to go there, and that it was dangerous to play on the turn table? A. Yes. Third. Was Verne Twist, when he went to play on this turn table, on the day when he was hurt, of sufficient age and discretion to understand and comprehend the danger he subjected himself to? A. No." These special find-

ings must, if possible, be so construed as to be consistent with each other, and also supportable by the evidence. If the third finding means that the boy was of such tender years as to be incapable of exercising

any judgment and discretion, or of understanding that his acts exposed him to danger, it would be inconsistent with the other findings, and wholly unsupported by the evidence. In the light of the testimony, and taken in connection with the previous findings, all that it can mean is that while the boy knew that he had no right to play on the turn table and that it was dangerous to do so, yet he did not fully understand or appreciate the extent of the danger in all its possibilities. But this may be said of almost every case of contributory negligence, even on part of adults. No one voluntarily and unnecessarily enters a danger which he knows to exist without expecting to escape it. In all cases of conscious self exposure there is a failure to realize the extent or degree of the risk. But the act is none the less contributory

negligence, if the party fails to exercise ordinary care. In the present case, while the boy did not realize the extent of the danger as fully as would an adult, yet he knew that he had no right to go upon the turn table; that his father had warned him that it was dangerous, and he himself knew that it was dangerous. Yet he goes, a conscious trespasser, and does the forbidden and dangerous act. While we are not disposed to adopt a severe rule by which to judge the conduct of childhood, yet such conduct on part of an intelligent boy of nearly 10½ years amounts to contributory negligence, and cannot be excused on the plea of childish instincts. We are of opinion that upon the special findings the defendant was entitled to judgment.

The cause is remanded with directions to the district court to enter judgment for defendant.

Injuries to Children—Turn Tables.—In an action to recover damages for injuries sustained by a boy of tender years upon a turn table, while evidence as to the intelligence of the boy and his capacity to know and understand the danger is admissible, yet testimony as to his prudence or recklessness in encountering it is incompetent and it is not error to exclude the testimony of a witness as to the boy's judgment and discretion. In such an action, evidence as to former accidents upon the turn table is not admissible unless knowledge thereof is first brought home to the defendants. Where the plaintiff has offered testimony that one railroad company had in fact locked its turn tables, the testimony of witnesses on behalf of the defendant as to the custom of well regulated railroads in reference to locking and guarding their turn tables is admissible as bearing on the question of negligence. *Bridger v. Asheville & S. R. Co.* (S. Car.), 3 S. E. Rep. 860.

In an action to recover damages for injuries sustained by a child whilst playing on a turn table, the test of the child's capacity for contributory negligence is his age, his intelligence, his ability to know his surroundings and the danger of what he was doing with the turn table, and if the injured boy does not seem on the one hand to have been so young as to require the judge to say that he could not contribute to his injury, nor on the other hand of that age where the presumption would necessarily arise in the absence of testimony to the contrary, the question is properly left to the jury. *Bridger v. Asheville & S. R. Co.* (S. Car.), 3 S. E. Rep. 860.

Such an action is governed by the law of the place where the injury was inflicted and where the parties resided. Accordingly, where the plaintiff sued in South Carolina for an injury sustained in North Carolina, it is not error for the court to charge "that children of tender years could only be held responsible for contributory negligence according to their age, capacity and development, unless the jury come to the conclusion that the law of North Carolina fixed an age at which they were to be held as responsible as adults." *Bridger v. Asheville & S. R. Co.* (S. Car.), 3 S. E. Rep. 860.

Same—Crossing Track—Contributory Negligence.—Plaintiff, a boy ten years old, active, bright and intelligent for his age, attempted to cross a railroad track at a public crossing as soon as a train had passed. When he reached the further track he was struck by a train coming in the opposite direction which was traveling at a rate of speed prohibited by law and without ringing the bell or giving any warning. *Held*, that the contributory negligence of the plaintiff was properly submitted to the jury, the caution required of the boy being according to his age and capacity, and determinable from the facts and circumstances developed on the trial. *McGuire v. Chicago, Milwaukee & St. Paul R. Co.*, 37 Fed. Rep. 54.

See also 4 Am. & Eng. Encyc. of L. 53, note 25 Am. & Eng. R. R. Cas. 543;

Union Pac. R. Co. v. Dunden, 34 Ib. 88; Kolsti v. Minneapolis & St. L. R. Co., 19 Ib. 141; Nagel v. Missouri Pac. R. Co., 19 Ib. 702; Evansich v. Gulf, C. & S. F. R. Co., 6 Ib. 182.

GULF, COLORADO AND SANTA FE R. CO.

v.

WALKER.

(70 Tex. 126.)

Personal Injuries—Switches—Frogs—Negligence.—In an action brought in Texas to recover damages for injuries sustained through plaintiff's foot being caught in the unblocked frog of a switch upon a public street, testimony that railroads in the northwestern States had adopted a device consisting of a block of wood fastened between the rails at the frogs of switches and had used the same for four or five years, and that without some similar contrivance the switches were not safe for pedestrians, is admissible for the purpose of showing negligence on the part of the railroad company.

Same—Instruction.—In such an action it is not error for the court to refuse to charge that railroad companies are not required to discard reasonably safe appliances in order to introduce new inventions, the question in issue being the adoption of a safeguard against a known danger in addition to the appliances already in use.

Same—Public Street—Trespasser—Instruction.—Where a person is injured through the unsafe condition of the tracks laid upon a public street, it is not error for the court to refuse to instruct the jury that railroad companies are not bound to use the highest degree of care to avoid injuring one who may possibly trespass upon its property, the plaintiff in such action being in no sense a trespasser.

Same—Right of Public—Instruction.—In an action to recover for injuries sustained through plaintiff's foot catching in the unguarded frog of a switch in a public street in which there are no sidewalks, it is not error for the court to charge "that the primary purpose and design of a public street in a city is for vehicles and persons to pass over and travel upon, and the use of such street for railroad tracks and trains thereon, when permitted, is to a certain extent and in a limited sense, subservient to the original design of such streets for travel over and upon them," though the court do not define the words "to a certain extent and in a limited sense."

Same—Duty of Company—Degree of Care.—In such an action, an instruction that "a railroad company using a public street in the city for its track and trains thereon must use all the care and precaution that it reasonably could and should to prevent accidents to any persons using such streets" properly instructs the jury as to the degree of care required of the company.

Same—Instruction—Foresight.—In such case, an instruction which declares the defendant to be liable if the jury find "that either the owner of the track or those using it, in the exercise of care, prudence and foresight should have had the track protected so as to avoid danger therefrom" is not open to the objection that by the use of the word "foresight" the court imposed upon the defendant a degree of care greater than the law requires.

Same—Negligence of Engineer.—It is not error for the court to charge in such action that the jury must find for the defendant if the track was safe and if the engineer was not negligent in failing to ring his bell or blow his whistle, or in

failing to keep a strict look-out, and if after discovering plaintiff upon the track he did everything in his power to stop the train.

APPEAL from District Court, Harris County.

Action by Wm. Walker, Jr., by his next friend, against the Gulf, Colorado & Santa Fe R. Co. to recover damages for personal injuries sustained through being run over by one of defendant's trains in a street in the city of Houston. A verdict for the plaintiff of \$2,000 having been rendered, the defendant moved for a new trial. The motion having been overruled, defendant appealed. The sixth assignment of error referred to in the opinion is in the following terms:

"If you are satisfied, from the evidence, that the injuries to William Walker were done and occasioned by defendant's train, on a track then in its use, and that such injuries were proximately caused from negligence of the engineer, or from want of there being at that place guards to the frogs of such track; if you find that either the owner of the track or trains using it, in the exercise of care, prudence, and foresight, should have had the track protected so as to avoid danger therefrom; and if you further find, from the evidence, that William Walker was not himself negligent, or that, if negligent, yet his injuries would not have occurred had the engineer used all such care and caution as he reasonably should in blowing the whistle and ringing the bell, and endeavoring to stop the train, from the time it reasonably appeared, or should have appeared, that plaintiff would not or could not get off the track, then, and in case you so find the facts, your verdict should be for the plaintiff."

Jones & Garnett for appellant.

Brady & King for appellee.

GAINES, J.—Appellee, while walking along the track, in the city of Houston, of a railroad upon which the appellant ran its trains, had his foot caught between the rails of the switch, and ran over by train of the company. The accident resulted in the loss of his foot. He was but a boy at the time of the injury, and brought suit by his father as his next friend, and obtained a verdict and judgment against the appellant for \$2,000. The depositions of three witnesses residing in Davenport, Iowa, were taken on behalf of plaintiff, who testified that a certain device consisting of a block of wood fastened between the rails at the frogs of the switches were in use upon certain railroads in the northwest, and had been so used for four or five years; that it prevented the danger to persons employed upon or walking over the track of catching a foot in the switch; and that without some similar contrivance the switches were not safe. To the reading of this testimony the defendant objected,

but the objection was overruled by the court. The objections were, in substance, that the answers of the witnesses showed only

Evidence as to devices for blocking frogs. that the appliance had been used upon a few railroads in a distinct part of the country, and was not competent to prove that its use was so long and so generally established as to make the duty of the defendant company to adopt and use it upon its road in Texas. We do not think the objection well taken. It is true

that it is not the duty of a railroad company to discard reasonably safe machinery, and to adopt a new device for the safety of its employes, until by its general and continued use, or otherwise, its superiority has been established. The evidence in this case shows that the frog of the switch without some guard of this character was dangerous to brakemen, and, though to a lesser degree, also to pedestrians passing over the track. The testimony objected to tended very strongly to prove not only that an unblocked switch was unsafe, but also that there was a simple, cheap, and effectual device by which danger of accidents from this source might be avoided. It also appeared from other evidence in the case that at the place where the accident occurred there were no sidewalks, and that the street was practically taken up with railroad tracks. The public had the right to use the street to pass over it either on foot or with vehicles, notwithstanding the right of way granted to the railroad company. *Baltimore etc. R. Co. v. Fitzpatrick*, 35 Md. 32. There being evidence calculated to prove that the switches were dangerous to persons who had the right to pass along or over the streets, the testimony under consideration was admissible as tending to show that there was a simple appliance which would have remedied the defect. We therefore think the court did not err in admitting it.

During the progress of the trial the counsel for defendant asked the court to give the following instruction: "The jury are instructed that railroad corporations are not required to discard their machinery and appliances for operating their trains, in order to introduce new inventions which are supposed to be improvements on the old appliances in use, but which are not in general use; and you are further charged that railroad companies are not, any more than individuals, bound to use the highest degree of care to avoid injuring one who may possibly trespass upon its property, but, as to such persons, are only required to use ordinary care." This was refused by the court, and its refusal is assigned as error. But in our opinion the assignment is not well taken. We think that both the propositions contained in the charge were calculated to mislead the jury. The evidence did not present a question of the propriety of discarding old machinery for new, but one of the propriety and practicability of providing against a known

Introduction of new appliance—Instruction.

danger by the addition of a simple device to appliances already in use. The first proposition may have led the jury to conclude that, in the opinion of the court, there was something to be discarded, and was not applicable to the evidence, and therefore improper. The second proposition in the instruction was calculated to induce the jury to consider the plaintiff as a trespasser upon the track of the company. He had the right to pass along the street, especially in a case like this where there was no sidewalk, although the streets were occupied by the railroad track, and although it was his duty to get out of the way of a passing train.

He was not in any sense a trespasser. The charge being calculated to mislead the jury, it was not error to refuse it.

What we have already said is sufficient to dispose of the fourth assignment of error. It complains of the refusal of the court to give a special charge which would have directly instructed the jury that, if plaintiff went upon the track of the railroad, he was a trespasser, and the company was under no obligations to construct its track with reference to the safety of such trespassers. Such an instruction, as applicable to the case made, was clearly erroneous, and was properly refused.

**Plaintiff
not a
trespasser.**

Appellant's fifth assignment is that the court erred in charging the jury as follows: "That the primary purpose and design of a public street in a city is for vehicles and persons to pass over and travel upon, and the use of such street for railroad tracks and trains thereon, when permitted, is, to a certain extent and in a limited sense, subservient to the original design of such streets for travel over and upon them. In this case it is admitted that defendant company had the right to use the track, and that the Texas & New Orleans Railway Company owned the track, and has the right to use the street at the place where the accident occurred. A railroad company using a public street in a city for its track and trains thereon should use all the care and precaution that it reasonably could and should to prevent accidents to any and all persons using such streets, and the nature and extent of danger from neglect of duty on defendant's part." The first objection to this instruction is that it does not define what the court means by the words, "to a certain extent and limited sense." But we think no such definition necessary. There is nothing in this, when considered in the light of the whole charge, to leave the jury to infer that the company did not have the right to run their trains over the track at all times. They may have inferred that this right was limited by the duty of exercising reasonable care in keeping in order their track and operating their trains, so as to prevent injuries to persons who also had the right to use the streets in passing from one

**Railroads
in streets—
Duty of
Company—
Instruc-
tions.**

point in the city to another. The charge intimates no other limitation upon the right of the defendant company to the use of its track along the street, and the jury could not have been misled into supposing that any other was meant. The further ground of objection to this charge is that it did not properly state the law as to the degree of care required of the defendant company. The instruction, in effect, tells the jury that the defendant was bound to exercise reasonable care to prevent danger to persons lawfully using the street. In a leading case this language is used: "It is correctly said that, generally, between persons standing in no particular relation to each other, that alone is reasonable care which, in the judgment of men in general, is proportionate to the probability of injury to others; and, consequently, he who does what is more than ordinarily dangerous is bound to use more than ordinary care." *Morgan v. Cox*, 22 Mo. 373. This defendant in this case was bound to use a degree of caution corresponding to the danger of operating its trains over the street of a city, where by reason of the absence of sidewalks, persons might be expected to walk along and across the tracks. This was reasonable care and therefore the charge was not erroneous.

Another portion of the charge is also complained of in the sixth assignment of error. The court there uses this language: "If you find that either the owner of the track or trains using it, in the exercise of care, prudence and foresight, **Same—** *"Foresight."* should have the track protected so as to avoid danger therefrom;" and it is contended that by the use of the word "foresight" the court imposed upon the defendant a degree of care much greater than the law requires. But we think, in the connection in which it is used, the term was synonymous with "prudence," and added nothing to the meaning of that word. The word "foresight" might very properly have been omitted, but we do not see that the jury could have been misled by its use.

Neither do we find any error in that part of the charge set out in appellant's seventh assignment. It instructs the jury in effect, to find for the defendant if the track was safe, and if **Signals—** the engineer was not negligent in failing to ring his bell, or blow the whistle, or in failing to keep a proper **Lookout.** lookout, and, if after discovering plaintiff upon the track, he did everything in his power to stop the train." This was correct. If there was a failure on part of the company or its engineer in either particular so mentioned, and this failure was the cause of the injury, then the verdict should have been for the plaintiff. In another portion of the charge the jury were told that plaintiff could not recover if by his own negligence he contributed to the injury.

This disposes of the assignments presented in the appellant's brief, and we find no error in the rulings or charge of the court.

The judgment is therefore affirmed.

Negligence Causing Death—Statutory Liability.—Previous to the amendatory act of March 25, 1887, a railroad company was only liable for gross negligence, and not for ordinary negligence, of servants under the provisions of the Texas Revised Statutes, Art. 2899, conferring a right of action against railroad companies for injuries causing death, when the death was caused by the negligence of the proprietor or by "the unfitness, gross negligence or carelessness of the servants." The plaintiff in an action to recover damages for injuries to a child, cannot recover under the statute except the company's servants were guilty of gross negligence even though they saw that the child was in danger from the train. *Sabine & East Texas R. Co. v. Hanks (Tex.)*, 11 S. W. Rep. 377.

Defective Switches—Unblocked Frogs—Injuries to Employees.—A brakeman who enters the services of a railroad company and remains in it without complaint after he is aware of the condition of the frogs in use, assumes the risk of accidents arising therefrom, and cannot recover for injuries sustained while coupling cars through his foot having caught in an unblocked frog. *Lake Shore & M. S. R. Co.*, 74 Ind. 440; s. c., 5 Am. & Eng. R. R. Cas. 474; *McGinnis v. Canada Southern B. Co.*, 8 Am. & Eng. R. R. Cas. 135; *Rush v. Missouri Pac. R. Co.*, 28 Am. & Eng. R. R. Cas. 484; *Burlington, C. R. & N. R. Co. v. Coates*, 15 Am. & Eng. R. R. Cas. 265. The burden of proving that the employee had knowledge of the condition of the frog and continued in the employment of the company without making complaint is on the defendant. *Burlington, C. R. & N. R. Co. v. Coates*, 15 Am. & Eng. R. R. Cas. 265.

An allegation in an action by a brakeman that defendant had failed in its duty to its servants in failing to block its frogs; and that the use of blocks would have precluded the accident from happening is not sufficiently supported by showing blocks were in use in Canada and to some extent in the United States, without showing that they were in general use, or that it was desirable for the proper management of railroads that they should be adopted. *McGinnis v. Canada S. B. Co.*, 8 Am. & Eng. R. R. Cas. 135.

Where it appeared from the evidence that unblocked switches had been in use throughout the country for years, and it might reasonably be inferred that the blocking of switches was, up to that time, only an experiment, the court held that there was no obligation on the company to block its frogs for the safety of its employees. *Chicago, R. I. & P. R. Co. v. Londergan*, 28 Am. & Eng. R. R. Cas. 491.

When the injury has been occasioned while coupling cars, a witness cannot testify what danger arises, under such circumstances, from the use of unblocked frogs, and whether a person engaged in coupling could see the frog or track. But the plaintiff may show that the company issued a general order to block all frogs, and that the particular frog which caused the injury was neglected. *Burlington, C. R. & N. R. Co. v. Coates*, 15 Am. & Eng. R. R. Cas. 265.

Where a brakeman failed to couple cars at the first attempt, and instead of stepping out from between them, continued the attempt while the cars were moving on, and caught his foot in the frog, it was held that although the company failed to furnish cars which would couple easily, yet its failure to do so was not the proximate cause of the accident. *Williams v. Central R. Co.*, 43 Iowa 396. See also *Waldheir v. Hannibal & St. J. R. Co.*, 87 Mo. 37.

Same—Injuries to Passengers.—Where a street railway company operates a double track, and a car has to be lifted to the wrong track in order to pass an obstruction, the company is not negligent in not placing frogs so as to prevent a car going in the wrong direction from being thrown off the rails. *White v. Milwaukee City R. Co.*, 18 Am. & Eng. R. R. Cas. 213.

LAPLEINE

v.

MORGAN'S LOUISIANA AND TEXAS R. AND STEAMBOAT CO.

(Louisiana Supreme Court, October, 1888.)

Personal Injuries—Infant—Witness—Competency.—In a suit by the father of a minor child for the latter's separate use and benefit, the mother is not disqualified as a witness, because she does not testify for or against her husband, but for or against the child; and the case is not affected by the provision of law giving to fathers and mothers the enjoyment of the estate of their minor children.

Same—Co-operating Causes—Proximate Cause.—When two causes co-operate to produce the damage resulting from a legal injury, the proximate cause is the originating and efficient cause which sets the other cause in motion.

Same—Sick Person—Measure of Damages.—The duty of care and of abstaining from the unlawful injury of another applies to the sick, the weak, the infirm, as fully as to the strong and healthy; and when the duty is violated the measure of damages is the injury done, even though such injury might not have resulted but for the peculiar physical condition of the person injured, or may have been aggravated thereby.

Same—Hereditary Predisposition to Disease.—Thus, though the damage done to a child by an injury appears to be aggravated by a latent hereditary hysterical diathesis, which had never exhibited itself before the accident, and might never have developed but for it, the party in fault will be held for the entire damage as the direct result of the accident.

APPEAL from District Court, Parish of Iberia.

Action by a father to recover damages for a personal injury received by his minor child. Defendant appeals from a verdict and judgment for plaintiff.

The facts are stated in the opinion.

Robert S. Perry for plaintiff.

Don Caffery for defendant.

FENNER, J.—The plaintiff sues in behalf of his minor child, Marie Lapleine, to recover damages for injury inflicted upon her through the fault of the defendant company. He alleges that in April, 1885, Marie, with other children, was at play in the rear part of her father's yard, on the inside of a plank fence separating said yard from the railroad track of said defendant, when a train of cars belonging to the latter, and loaded with split lumber, passed along said track; and the stakes confining said lumber becoming loose or disarranged, the lumber broke away from its fastening and tumbled off the car, part of it being precipitated over the fence, and falling into plain-

tiff's yard, striking the child Marie, and inflicting on her the injuries complained of.

The evidence is, to our minds, conclusive on the following points, viz.: (1) that the lumber was precipitated from defendant's car, over plaintiff's fence and into his yard, substantially in the manner charged; (2) that this was caused by the improper loading or insufficient fastening of the lumber, and by the imprudent handling of the train, and is imputable exclusively to the negligence and fault of defendant; (5) that the child Marie was struck and injured by the falling lumber; (4) that the child was entirely free from any fault or contributory negligence of any kind whatever.

As to all the above points, except the third, there is no room for the slightest dispute. As to the third point the evidence is conflicting, but after a thorough scrutiny we are perfectly satisfied that Marie was struck and injured by the lumber. The child was undoubtedly in the yard, and was where the lumber fell. The lumber was pitched over into that yard. Immediately afterwards the child was found with a wound upon her head and bruises on her body; and she stated she had been hurt by the falling lumber, although, by reason of her age and condition, she was not admitted as a witness. The colored nurse, Mary Coleman, was the only immediate witness of the injury to the child. She is a curious example of utter depravity and insensibility to the obligation of truthfulness. She pretends to have been bribed by both parties, and her only complaint was that neither had paid the promised bribe. She was put on the stand by plaintiff, and testified on every point in her favor. The counsel for defendant then produced a written statement made by her before a notary, and under oath, some time before, in which she contradicted nearly everything she had just been saying. Of course such a witness is unworthy of belief. But it is a significant fact that in the statement above referred to, which had been obtained from her by the agents of defendant, and was produced by it on the trial, she stated positively that Marie was struck and hurt by the lumber. On this point we believe she told the truth. She is confirmed by Mrs. Lapleine, the mother of Marie, who saw the child when she was withdrawn from the lumber that had fallen upon her. Her testimony was objected to on the ground that she was incompetent under the provision of Rev. Civ. Code, art. 2281, which declares that a "husband cannot be a witness for or against his wife, nor a wife for or against her husband." It is clear that this is not the husband's suit, but that of the child. The petition itself expressly declares that he sues "in his capacity as father to his minor child, Marie, and for her separate use, benefit, and advan-

Child in-
jured by
falling
lumber.

Testimony
of child's
mother.

tage." The circumstance that, under Civ. Code, art. 223, "Fathers and mothers shall have, during marriage, the enjoyment of the estate of their children until their majority or emancipation," subject to the obligation of supporting and educating them, is not sufficient to disqualify either of them as witnesses in cases in which their children are parties. If it would disqualify either, it would disqualify both, since the law gives the enjoyment to "fathers and mothers."

There is much other corroborating and confirmatory testimony; and the whole taken together completely overwhelms the efforts of one or two employes of the railroad to establish that Marie was not struck by the lumber, but was some distance from where it fell, and was hurt by tripping and falling as she ran away in alarm. Not only is this theory inconsistent with all the facts and other testimony, but it is utterly insufficient to account for even the apparent physical injuries which Marie undoubtedly received. The foregoing points being thus settled, it conclusively follows that the defendant is responsible for the damages legally occasioned by its negligent fault. As to the nature and extent of the injury, it is shown, without any semblance of contradiction, that up to the moment of this accident Marie, then eight years old, had been a bright, intelligent, active, and thoroughly healthy child. From that moment she became and has remained a constant invalid, seriously affected in mind and body, her nervous system shattered, subject to headache, to attacks of nausea and vomiting, to frequent and sudden fainting or falling fits, emaciated, indisposed to physical or mental exertion, dragging her limbs in walking, and otherwise afflicted. At the time of this trial about two years had elapsed since the accident, and, though slightly improved, the child continues to a great extent affected, as above indicated. The medical testimony indicates that it is doubtful when or whether she will ever entirely recover.

If the foregoing injury and suffering has been occasioned by the accident, as the legal proximate cause, it would be difficult to say that the verdict of the jury for \$7,500 was excessive. But defendant maintains that the physical injuries directly inflicted upon the child were slight and unimportant, and utterly inadequate in themselves to produce the disastrous results which have been manifested; that these results have been occasioned by the peculiar constitution of the child, who inherited from its mother a hysterical tendency, or diathesis, the development of which has intervened as the operative and efficient cause of her affliction and sufferings; and that the accident is not, therefore, the true *causa causans*—the proximate and efficient cause—casting responsibility on defendant. We are by

Physical
injuries
received
by child.

Same—
Proximate
cause—
Injury ag-
gravated
by disease.

no means satisfied that the external manifestations indicate conclusively the extent and nature of the injury received, or that the shock and derangement of the nervous centers and spinal cord may not have been sufficient to produce like results in an ordinarily constituted child. It is, however, proved that the mother of the child is subject to hysteria; that hysteria is, in many cases, heritable; and that the symptoms of the child's affliction are in many respects of a hysterical character. But it is very certain that the child had never exhibited the slightest symptom of hysteria or other constitutional disease prior to this accident. The medical testimony does not establish that hysteria is necessarily or universally inherited; and it does not appear that, but for this accident, Marie might not have passed her entire life without the slightest development of hysteria. Admitting, therefore, that the child had a latent hysterical diathesis, in order to escape liability it would devolve on defendant to show that such diathesis was by itself a sufficient independent cause which would have operated in producing or aggravating the damage independently of the accident. In this defendant has entirely failed. If the hysterical diathesis concurred with the accident in producing the damage, in determining which of the two is the proximate cause, we must enquire which was the cause that set the other cause in motion. In the language of the supreme court of the United States: "The proximate cause is the efficient cause; the one that necessarily sets the other causes in motion." *Ætna Ins. Co. v. Boon*, 95 U. S. 117.

We are cited to a Colorado case, which holds that where the physical condition of the person injured is at the time of the injury such that the injuries caused by the negligence are thereby aggravated, the railway is not liable for that aggravation. *Car Co. v. Barker*, 4 Col. 344.

Same—
Authorities.

We think, however, the doctrine is not sound, and is not in accord with the weight of authority. The duty of care and of abstaining from injuring another is due to the weak, the sick, the infirm, equally with the healthy and strong; and when that duty is violated the measure of damage is the injury inflicted, even though that injury might have been aggravated, or might not have happened at all but for the peculiar physical condition of the person injured. Thus in one case a person afflicted with scrofulous disease was injured by the negligence of a municipal corporation in failing to keep its streets in repair, and suffered damage greatly in excess of what he would have suffered but for his disease; yet the court held that the corporation was bound to keep its streets in repair for the sick and infirm as well as for the well, and held the city liable for the whole damage. *Stewart v. Ripon*, 38 Wis. 584.

In another case a pregnant woman was injured, resulting in mal-

formation of the child carried, and its subsequent delivery dead; and the author of the negligence was held liable for the whole damage. *Shartle v. Minneapolis*, 17 Minn. 308.

So a railway was held liable for cancer following at an interval of three weeks after a blow on the breast of a female. *Baltimore City Pass. R. Co. v. Kemp*, 61 Md. 74. See also *Terre Haute & I. R. Co. v. Buck*, 96 Ind. 346; *Jucker v. Chicago & N. W. R. Co.*, 52 Wis. 150; *Delie v. Chicago & N. W. R. Co.*, 51 Wis. 400; *Sauter v. New York, C. & H. R. R. Co.*, 66 N. Y. 50; *Beauchamp v. Saginaw Min. Co.*, 50 Mich. 163; *Barbee v. Reese*, 60 Miss. 906; *Patterson, R. Acc. L.* §§ 29, 278; 2 *Thomp. Neg.* 1099.

The inheritance of an hysterical diathesis (if one existed) was a misfortune, but certainly not a fault, in this child; in no manner diminished her right to protection from injury by the fault of defendant. Prior to this accident she had never suffered from this latent constitutional taint. But for the accident she might never have suffered from it. The accident was the direct, immediate, and efficient cause which set in motion all other causes which created or aggravated the damage; and the defendant is justly bound to answer for these deplorable consequences of his fault. There is evidence, however, showing that the child's affliction and injury have been aggravated by the injudicious conduct and treatment of her mother. For such aggravation of the damage suffered it goes without saying that defendant cannot be held liable. We need not particularize as to the nature of this conduct, except to say that it does not reflect upon her sincerity, but only on her injudicious sympathy, encouragement, and excitement of the child's disordered nervous system. This and some other considerations lead us to reduce the damages allowed by the jury.

It is therefore ordered and decreed that the verdict and judgment appealed from be amended by reducing the principal thereof to \$5,000, and as thus amended it be affirmed; appellee to pay cost of appeal.

Disease Developed or Aggravated by Injury.—See 4 *Am. & Eng. Encyc. of L.* 31; *East Line & R. R. R. Co. v. Rushing*, 34 *Am. & Eng. R. R. Cas.* 367; *Owens v. Kansas City, St. J. & C. B. R. Co.*, 33 *Ib.* 524, note, 530.

PENNSYLVANIA R. CO.

v.

BOWERS.

(Pennsylvania Supreme Court, February 11, 1889.)

Personal Injuries—Statute Limiting Liability—Repeal.—A statutory provision that the amount to be recovered in actions against railroad companies shall be limited to \$3,000 in cases of personal injuries, and \$5,000 in cases of death, and that "upon the acceptance of the provisions hereof by any carrier or corporation, the same shall become a part of its act of incorporation," does not, by acceptance of the provisions of the act by a company incorporated before its enactment, become a contract between the company and the State which cannot be abrogated by the repeal of the statute.

ERROR to Circuit Court of Common Pleas, Philadelphia County.

Action by Mary Bowers against the Pennsylvania R. Co. for damages for negligently killing Thomas L. Bowers, plaintiff's husband. The jury returned a verdict for \$14,500, of which \$10,000 was remitted and judgment entered for the remainder. The defendant brings error.

Geo. Tucker Bispham for plaintiff in error.

P. F. Rothermel, Jr. for defendant in error.

PAXSON, C. J.—The fifth assignment squarely raised the important question of this case. It alleges that the learned court below erred in affirming the plaintiff's second point.

The point is as follows: "That the limitation of liability for damages, claimed by the defendant under and by virtue of the act of April 4, 1868, has been revoked and avoided, as to the defendant corporation, by the provisions of the twenty-first section of article 3 of the constitution of Pennsylvania, known as the 'new constitution'." This second section of the act of 1868 (P. L. 58) limits the amount to be recovered, in actions against railroad companies and common carriers for negligence, to \$3,000 in cases of personal injuries, and \$5,000 in case of death. The fourth section of said act provides that, "upon the acceptance of the provisions hereof by any carrier or corporation, the same shall become a part of its act of incorporation." Upon the trial below the defendant company proved its acceptance of the provisions of this act, and claimed that by such acceptance the act of 1868 was written into its charter. The manner of the proof of this fact has been criticised. The acceptance, as shown upon the trial, was by a resolution of

the board of managers, and not by a vote of the stockholders. We prefer, however, not to decide this case upon technical grounds, and shall treat the action of the managers as an acceptance by the company.

Section 21, art. 3, of the constitution is as follows: "No act of the general assembly shall limit the amount to be recovered for injuries resulting in death, or for injuries to persons or property, and, in case of death from such injuries, the right of action shall survive, and the general assembly shall prescribe for whose benefit such actions shall be prosecuted. No act shall prescribe any limitations of time within which suits may be brought against corporations for injury to persons or property, or for other causes different from those fixed by general laws regulating actions against natural persons, and such acts now existing are avoided." This clause of the constitution first came up for consideration in connection with the act of 1868, in *Pennsylvania R. Co. v. Langdon*, 92 Pa. St. 21; 1 Am. & Eng. R. R. Cas. 87. It was there held, Mr. Justice TRUNKEY dissenting, that the act of 1868 was not avoided by the above recited clause in the constitution. The writer of this delivered the opinion in that case. It was followed by *Lewis v. Hollahan*, 103 Pa. St. 425, where it was said by Mr. Justice STERRETT: "The case of *Pennsylvania R. Co. v. Langdon*, cited and relied on by the plaintiff in error, was well decided on other controlling questions, but we do not see our way clear to follow it as authority on the precise constitutional question involved in this case. One of the questions in that case was as to the effect of acceptance by the company of the act of 1868. In this case that question does not arise." There was no dissent in that case. In a subsequent case (*Philadelphia W. & B. Co. v. Conway*, 112 Pa. St. 511), there was an attempt to raise the same question on the part of the above named railroad company. There was no proof on the trial below that the company had accepted the provisions of the act of 1868, and that case was decided upon other grounds. In delivering the opinion of the court, I said: "It may not be out of place just here to correct a misapprehension of the learned judge below in regard to *Pennsylvania R. Co. v. Langdon*, *supra*. That case has not been overruled, as he supposes. Some of the reasoning by which it was supported is not sustained by the late case of *Lewis v. Hollahan*, and, as my brethren are wiser than myself, I cheerfully submit to their views. Moreover, if, when the main question comes up again, *Pennsylvania R. Co. v. Langdon* shall be found to be a mistake, it will afford me pleasure to join in overruling it." This was our latest deliverance upon this subject. The broad question is now fairly presented again, we have been aided by an exceptionally able argument, and it is fitting that we should now

review our former ruling and, if necessary, correct it. I am free to say that my own views upon this question have undergone a serious change.

The first thought which an examination of it suggests is the effect of the acceptance by the defendant company of the act of 1868. If it was a contract with the state based upon a sufficient consideration, and a contract which the state had the power to make, there would be room for the argument that it came within the principle of the well known line of cases, commencing with the Dartmouth College case. The act of 1868, however, was not a part of the original charter of the company. Its road was not constructed, nor was a dollar expended, upon the faith of it. So far as appears by this record, no consideration was paid for it. It was an additional franchise or right which the State granted to the company, and which does not necessarily involve a contract. At common law a promise without consideration is not binding. So, I apprehend, a franchise granted without a consideration moving from the grantees of such franchise is not binding upon the state. The rule, as laid down in 2 Mor. Priv. Corp. § 1050, is as follows: "A franchise is merely a legal right or privilege, and may result from a simple legislative enactment, without any contract between the state and the possessors of the privilege. There is a plain distinction between a simple legislative enactment that a person or association shall be authorized to exercise certain rights or powers, and a contract or treaty made by the state through its legislature that the person or association shall be entitled to exercise the rights or powers. If a franchise is the result of a mere legislative enactment, it may undoubtedly be cut short by repeal of the enactment. If, however, the franchise is conferred by a contract or treaty on part of the state, and is absolute in terms, it must be regarded as an irrevocable right." Based upon the same common law rule, that a promise without a consideration is not binding, a grant of exemption from taxation by the legislature, unless based upon a consideration, does not bind the state, and property thus exempted by one legislature may be taxed by the next. In the recent case of Ferry Passenger Railway Co.'s appeal, 102 Pa. St. 123, in which I had the honor to deliver the opinion of the court, the rule is thus stated: "There is reason and authority for holding that a supplement to a charter of incorporation, which merely confers upon it a new right, or enlarges an old one, without imposing any new or additional burden upon it, is a mere licence or promise by the state, and may be revoked at pleasure. It is without consideration to support it, and cannot bind a subsequent legislature. *Johnson v. Crow*, 87 Pa. St. 184; *Christ Church v. Philadelphia*, 24 How. 300. In the present age of corporate greed, it would be dangerous to hold

Acceptance
of provisions
of statutes—
Impairing
contract.

the contrary doctrine. Were we to do so, corporations, instead of being the creatures of the State, might become its masters." In the same line are *Tucker v. Ferguson*, 22 Wall. 574; *West Wisconsin R. Co. v. Supervisors*, 93 U. S. 595; *Salt Co. v. East Saginaw*, 13 Wall. 373; *Hewitt v. New York & O. M. R. Co.*, 12 Blatchf. 452.

The right to recover damages for acts of negligence resulting in death did not exist at common law. It was conferred by the legislature, and the authority which gave it can take it away. It follows that it may limit it. The right of the legislature to barter away this right to a corporation, or to limit it, so as to make it a binding contract, beyond the reach or power of subsequent legislatures may well be doubted. It was within the power of the legislature at any time to have repealed the act of 1868. It follows that it came within the power of constitutional repeal, and we are all of opinion that the provisions referred to of said act are avoided by the present constitution. I make no apology for my change of views. Had I adhered to those formerly expressed, there might have been occasion for one.

Pennsylvania R. Co. v. Langdon, as was said by our Brother STERRETT, in *Lewis v. Hollahan*, *supra*, was well decided on other controlling questions, and upon all of those questions it stands as authority. To the extent, however, that it refers to the effect of the present constitution upon the act of 1868, it is now overruled. Judgment affirmed.

Effect of Pennsylvania Constitution.—For other cases involving the same constitutional provision and statute as the principal case, see *Pennsylvania R. Co. v. Langdon*, 1 Am. & Eng. R. R. Cas. 87; *Thirteenth & F. Sts. Pass. R. Co. v. Boudron*, 2 Ib. 30; *Philadelphia & R. R. Co. v. Boyer*, 2 Ib. 172.

Claims for Damages—Vested Rights—Eminent Domain.—A law subjecting railroad companies to liability for consequential damages caused by the construction of the road affects remedies only and is not within the constitutional provision against laws impairing the obligation of contracts; and companies already in existence are subject thereto. *Duncan v. Pennsylvania R. Co.*, 13 Phila. (Pa.) 68; 7 Am. & Eng. R. R. Cas. 1.

Same—Injuries Causing Death.—Where a statute repealing the act conferring the right of action was enacted after a suit had been prosecuted to judgment, it was held that a constitutional provision prohibiting the passage of laws impairing the obligation of contracts or retrospective in their operation had the effect of saving the plaintiff's right of action. *Denver, S. P. & P. R. Co. v. Woodward*, 4 Colo. 162; *Lundin v. Kansas Pac. R. Co.*, 4 Colo. 433. See also *Chicago, St. L. & N. R. Co. v. Pound*, 11 Lea (Tenn.) 127; s. c., 15 Am. & Eng. R. R. Cas. 510. Where, at the time of the death, the statutory right of action was vested in the administrator it was held that a statute enacted two months after the death which vested the right of action in the widow, merely effected a change of remedy, and was not unconstitutional as impairing a vested right. *Collins v. East Tennessee, V. & G. R. Co.*, 9 Heisk. (Tenn.) 841.

A constitutional provision which makes every person "that may commit a homicide through wilful act or omission, responsible in exemplary damages," does not abrogate a statute conferring a right of action for compensatory dam-

ages for negligently causing death. *Houston & T. C. R. Co. v. Moore*, 49 Tex. 31; *Cohen v. Texas Pac. R. Co.*, 2 Woods (U. S.) 346.

CRUMPLEY

v.

HANNIBAL AND ST. JOSEPH R. CO.

(*Missouri Supreme Court. March 18, 1889.*)

Negligently Causing Death—Penalty—Crossing—Failure to Ring Bell.—Under the provisions of the Missouri statute that a railroad company shall "forfeit and pay the sum of \$5,000" for causing death by negligently running its cars, the penalty may be recovered where a person is killed at a crossing through the negligence of the company's servants in running an engine and cars without ringing the bell or sounding the whistle.

Same—Defective Track—Passengers—Persons Using Crossings.—A statutory provision that a railroad company shall be liable for a penalty of \$5,000, "when any passenger shall die from any injury resulting from, or occasioned by any defect or insufficiency in any railroad, or any part thereof," has no application to the case of a person killed while crossing a railroad because of negligence in failing to provide a proper crossing, and it is error for the court in such case to direct the jury that if they find for the plaintiff the verdict must be for the fixed sum of \$5,000.

APPEAL from Circuit Court, Buchanan County.

White & Spencer and *Green & Burns* for respondent.

Strong & Mosman for appellant.

BLACK, J.—This is an action by the widow of Samuel Crumpley to recover damages in consequence of the death of her husband, who was killed by one of defendant's trains of cars while he was driving a team over the defendant's railroad at a public crossing. The causes of action set out in the petition, so far as brought forward as grounds of recovery, are—First, a negligent failure on the part of defendant's servants in charge of the train to ring the bell or sound the whistle, as required to do by section 806, Rev. St.; and, second, a failure on the part of the defendant to construct and maintain the crossing in the manner and of the materials specified in section 807. The court directed the jury that if they found for the plaintiff, either on the ground of a failure to ring the bell or sound the whistle, or on the ground of a failure to construct and maintain the crossing as prescribed by statute, or on both grounds, then they should assess the damages at \$5,000. The respondent has filed no brief in this court, and, as the appellant's abstract does not set out the evidence, there is but one question before us for a

consideration, and that is whether there is error in the instructions as to the measure of damages.

The sections before mentioned are found in the statute law concerning railroad corporations, and section 806 contains this clause: "Said corporation shall also be liable for all damages which shall be sustained by any person by reason of such neglect;" and section 807 contains a clause to the same effect. The contention is that as these sections give a remedy, and do not fix a penalty, the damages must be compensatory only, and that section 2121 of the personal damage act does not apply. In the application of section 2121, it can make no difference whether the negligence, resulting in death, is a breach of a statutory or a common-law duty. The same is true in those cases of negligence, resulting in death, where the damages are to be assessed by the jury at some amount not exceeding \$5,000. Sections 2121-2123, of the damage act, give to the representatives of the deceased person a cause of action where none existed in their favor at common law. In other words, if the injured party would have had a cause of action had death not ensued, then these sections give to the designated representatives a cause of action, and, if the case comes within section 2121, the defendant "shall forfeit and pay the sum of five thousand dollars." The enquiry, then, is whether the present case comes within the terms of that section. The conditions of the first clause of section 2121 are that death must result from or be occasioned by the negligence, unskillfulness, or criminal intent of the servant while, running, conducting, or managing any locomotives, car, or train of cars. The statute requiring the bell to be rung or the whistle to be sounded at these public crossings is a regulation for running the locomotive engine and cars. A failure to comply with the law is negligence *per se*, and negligence in this respect is negligence while running the locomotive and cars. If death results from such negligence, the case is within the statute fixing the damages or penalty at \$5,000. We have recently held that the widow of a servant who was a trackwalker could recover this penalty for negligence on the part of servants in charge of a train which ran over and killed him; the deceased not being a fellow-servant with the servants in charge of the train. The statute is both penal and compensatory. The reason of the statute, as well as its letter, applies to a case where the person is killed at a crossing by reason of negligence of the servants in running the engine and cars, by reason of a failure to ring the bell or sound the whistle.

But, if the negligence in this case consisted alone in a failure to construct and maintain a lawful crossing, then it cannot be said that the death resulted from or was occasioned by the negligence of the servants while running the locomotive or cars.

The negligence meant is that of the servants who are running or conducting the cars. If the plaintiff is entitled to recover the fixed sum of \$5,000 because of negligence in a failure to provide the proper crossing, it must be under the second clause of section 2121. The conditions of that clause are, so far as it has any application to this case, "when any passenger shall die from any injury resulting from or occasioned by any defect or insufficiency in any railroad, or any part thereof." The plaintiff's husband was in no sense a passenger, and for this reason the case does not come within this clause of that section. The court therefore erred in directing a verdict for \$5,000 if the jury found for plaintiff by reason of a defective crossing. From the only abstract filed, it cannot be told on which ground the jury based their verdict; nor is there anything to show that they found for plaintiff on the ground of a failure to ring the bell or sound the whistle. The judgment is therefore reversed, and the cause remanded. All concur.

**Penalty
for death
caused by
defective
track.**

Injuries Causing Death—Construction of Missouri Statute.—Mo. Rev. St. § 2121 is both penal and compensatory, and the emancipation of a minor son by his parents is no defence to an action by them for his death. *Philpot v. Missouri Pac. R. Co.*, 27 Am. & Eng. R. R. Cas. 323.

DELAWARE AND HUDSON CANAL CO.

v.

COMMONWEALTH.

(*Pennsylvania Supreme Court. October 1, 1888.*)

Taxation—Gross Receipts—Interstate Commerce.—The Pennsylvania act of June 17, 1879, which imposes a tax upon the gross receipts of railroad companies organized or doing business within the commonwealth "for tolls and transportation, telegraph business or express business" is invalid as a contravention of the provision of the federal constitution that congress shall have power to regulate interstate commerce in so far as such receipts are derived from commerce between points within and points without the State.

Same—Foreign Company—Locus of Property.—If any part of the receipts of a foreign company doing business within the State is taxable, the fact that the company has remitted its receipts to its principal office in another State does not affect the right of the state to levy a tax thereon.

Same—Interstate Commerce—Transportation—Temporary Detention.—Where coal destined for a point outside the State is temporarily detained at a point within the State, such detention does not interrupt the transit as to make the transportation of such coal local and not interstate commerce.

ERROR to the Court of Common Pleas, Dauphin County.
Account by the commonwealth of Pennsylvania against the

Delaware & Hudson Canal Co. for tax upon the gross receipts of the defendant for six months ending December 31, 1886. The defendant company is incorporated under the laws of the State of New York and has its general office and treasury in the city of New York, but a portion of its canal and railway system is situated within the State of Pennsylvania. The tax assessed against the defendant amounted to \$9,541.08, being eight-tenths of one per centum upon the sum of \$742,645.03. The statute by virtue of which the tax was imposed is as follows:

"Section 7. That every railroad company, canal company, . . . and every other company or limited partnership, now or hereafter incorporated or organized by or under any law of this Commonwealth, or now or hereafter incorporated or organized by any other State, and doing business in this Commonwealth, and owning, operating, or leasing to or from another corporation, company, or limited partnership any railroad, canal, . . . or other device for the transportation of freight or passengers, or in any way engaged in the business of transporting freight or passengers, . . . shall pay to the State Treasurer for the use of the Commonwealth a tax of eight-tenths of one per centum upon the gross receipts of said company for tolls and transportation, telegraph business, or express business. The said tax shall be paid semi-annually upon the last days of July and January in each year, the first payment to be due on the last day of July, *Anno Domini* one thousand eight hundred and seventy-nine; and, for the purpose of ascertaining the amount of the same, it shall be the duty of the treasurer or other proper officer of said company or limited partnership to transmit to the Auditor General a statement, under oath or affirmation, of the amount of gross receipts of the said company or limited partnership derived from all sources during the preceding six months ending on the first days of July and January; and if any such company or limited partnership shall neglect or refuse for a period of thirty days after such tax becomes due to make said returns, or to pay the same, the amount thereof, with an addition of ten per centum thereto, shall be collected for the use of the Commonwealth as other taxes are recoverable by law from said companies or limited partnerships: Provided, That whenever any corporation, company, or limited partnership, liable to a tax on gross receipts under the provisions of this section, possesses and exercises the right to mine or purchase and sell coal, the receipts derived purely from the sale of coal so mined or purchased by said company or limited partnership shall not be taxed, but every such company or limited partnership shall keep an account of the said coal, and in the said account shall charge itself with the transportation thereof, at the same rates as are charged or would be charged by the said company or limited

partnership for the transportation of similar freight for other companies or individuals, and the sums so charged for transportation shall be returned by the said company or limited partnership to the Auditor General, and shall be taxed as a part of the gross receipts of said company or limited partnership: And provided further, That in any case where the works of one corporation, company or limited partnership are leased to and operated by another corporation, company, or limited partnership, the taxes imposed by this section shall be adjusted between the said corporations, companies, or limited partnerships in accordance with the terms of their respective leases or agreements, but for the payment of the said taxes the Commonwealth shall first look to the corporation, company, or limited partnership operating the works, and, upon payment by the said company or limited partnership of a tax upon the entire receipts derived from the operation thereof, the corporation, company, or limited partnership from which the said works were leased shall not be held liable under this section for any tax upon the proportion of said receipts received by it as rental for the use of said works."

The company appealed from the assessment to the court of common pleas of Dauphin county, and filed the following objections: "(1) The Delaware and Hudson Canal Company is a corporation and citizen of the State of New York, having its principal office and place of business and general treasury in the city of New York, in said State; and at the time when the taxes claimed in the settlement hereby appealed from are alleged to have accrued or become due, and also at or prior to the time of the settlement of the account by the Auditor General, all of the receipts upon which taxes are charged were the personal property of said company in the city and State of New York, mingled with its other receipts and personal property in said State, and were not subject to taxation by the State of Pennsylvania. (2) Of the gross amount of \$742,635.03 upon which tax is charged in the settlement hereby appealed from, no more than \$158,141.98 was received, or ever was, physically, within the Commonwealth of Pennsylvania, and the said sum of \$158,141.98 received in Pennsylvania by agents of the company had been by them paid into the general treasury of the company in the city of New York, before the time at which the taxes claimed are alleged to have accrued and become due, and before the date of the settlement of the account by the attorney general. (3) The taxation by the State of Pennsylvania of property owned in New York by a corporation of the State of New York is in violation of a necessary implication of the constitution of the United States, that each State shall have jurisdiction only over property within its own territorial limits. (4) A large proportion of the receipts

**Objections
to settle-
ment of
tax.**

taxed in the settlement hereby appealed from, including a part of the \$158,141.98 actually received within the State of Pennsylvania, as well as the receipts never physically within the State of Pennsylvania, was derived from freight and passengers carried by continuous transportation from points in Pennsylvania to points in other States, or from points in other States to points in Pennsylvania, or from points in other States to points in other States passing through the State of Pennsylvania. The taxation of freight or passengers transported by continuous lines of transportation out of, into, or through the State of Pennsylvania, or of the receipts for such transportation out of, into, or through the State of Pennsylvania, is in violation of that clause of section 8, art. 1, of the constitution of the United States, which provides that congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes; and the act of June 7, 1879, under which said tax is claimed, or any other act of Assembly, if it shall be found to warrant the imposition of the said tax, is unconstitutional and void. (5) The taxation, or attempted taxation, by the State of Pennsylvania of moneys never physically within the State of Pennsylvania, but received and owned in New York by a corporation of the State of New York, because said moneys were received for the transportation of freight or passengers into, out of, or through the State of Pennsylvania, is in violation of that clause of section 8, art. 1 of the constitution of the United States, which reserves to congress the power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes, and is therefore void."

The following is the opinion of the court of common pleas:

"This case was tried without a jury under the act of 1874. We find the facts to be as follows:

"(1) The defendant is a transportation company incorporated by the State of New York. It owns and operates a canal and a line of railroad, part of which is in New York and part in Pennsylvania. It is doing business in this Commonwealth.

"(2) For the six months ending December 31, 1886, its gross receipts for business not done wholly within the State of New York were as follows:

For tolls and transportation of freight and passengers	\$375,516 87
For telegraph business	1,193 64
For express	3,186 05
For transportation of coal mined, purchased, and sold	362,738 47
Total	\$742,635 03

"(3) Of the amount received for tolls and transportation, \$220,780.95 was received for transportation between points both of which are within the State of Pennsylvania; \$89,635.07 was re-

ceived for transportation, beginning in Pennsylvania and ending in other States; \$56,797.95 was received for transportation, beginning in other States and ending in Pennsylvania; and \$8,302.90 was received for transportation beginning and ending in other States, but passing through Pennsylvania on the way. In the last three classes the transportation was continuous from the point of beginning to the point of ending, and the freight and passengers were carried for a single sum or charge, and upon a single way-bill or ticket.

"(4) The amounts received for telegraph business and for express business were wholly for business done between points both of which are in Pennsylvania.

"(5) Of the amount received for transportation of coal mined, purchased, and sold, \$930.14 was received for transportation between points both of which are in Pennsylvania; \$27,610.63 was received for the transportation of coal shipped from the defendant's mines in Pennsylvania, and then destined to points without the State, but temporarily detained at Honesdale, Pa., and actually there on December 31, 1886: and \$334,197.70 was received for the transportation of coal shipped from the defendant's mines in Pennsylvania, and ending in other States. The coal at Honesdale was afterwards carried to its destination outside the State.

"(6) Of the amounts received for transportation, telegraph, and express business, between points both of which are in Pennsylvania, viz.:

\$220,780	95
1,193	64
3,136	05
930	14
<hr/>	
\$226,040	78

—Only \$156,948.34 was received or ever physically within the State of Pennsylvania, the rest having been paid to the defendant in the State of New York. The said sum of \$156,948.34 was remitted to New York from time to time by the defendant's agents in Pennsylvania, and no part thereof was physically within the State on December 31, 1886.

"(7) This settlement taxes the entire gross receipts mentioned in paragraph 2 for the six months ending December 31, 1886, and is made under section 7 of the act of 1879 (P. L. 116).

"CONCLUSIONS OF LAW."

"The first, second, third, and fifth specification of appeal cannot be sustained. If any part of the company's gross receipts are taxable, the tax cannot be evaded by simply sending the money out of the State. The defendant itself is here for purposes of pro-

per taxation, and it does not matter where its funds are physically kept. *Western Union Telegraph Co. v. Com.*, 110 Pa. St. 405.

"The fourth specification raises a question which we have been reluctant to entertain, and which nothing but a clear conviction of the present state of the law could bring us to consider. The argument which supports it is directly in the face of the *Railway Gross Receipts* case, 15 Wall. 284 (decided by the supreme court of the United States in 1872), and *Philadelphia & S. M. Steamship Co. v. Com.*, 104 Pa. St. 109; *Pullman Palace Car Co. v. Com.*, 107 Pa. St. 148; and *Western Union Telegraph Co. v. Com.*, 110 Pa. St. 405 (decided by the supreme court of Pennsylvania). It is perhaps more correct to say that the argument chiefly attacks the case in 15 Wall., for the Pennsylvania cases rest upon that, and must stand or fall with it. If we had any doubt upon the subject we would be bound to give the commonwealth the benefit thereof, and uphold the tax in suit, leaving it to the supreme court of the United States to choose its own occasion of saying plainly how much authority its own decision should continue to have. But if the court has already spoken, and has plainly limited or destroyed the force of its earlier opinion, we are bound by this action also in the sphere of federal law, and cannot refuse to follow, even if some of our own decisions are still formally in the way. That this is in fact the present situation, and that the case in 15 Wall. has been in effect overruled, carrying with it, of course, the cases in which our own court simply followed that decision, we are entirely satisfied, and we think a short review of the late authorities will make clear.

"The *Railway Gross Receipts* case was that of the *Reading Railroad Co.*, a domestic corporation, and its receipts from all sources were held to be taxable by Pennsylvania for two reasons: First, because the receipts had passed into the general property of the company, and had thus lost their distinctive character as freight earned for transportation; and, second, because the tax was held to be upon the company's franchise, and to be only measured by the amount of its business as shown by its receipts. As the same court had just decided at the same term, in the *Freight Tax* case, 15 Wall. 232, that a tax upon the freight or tonnage carried from one State into another was a regulation of commerce, and could not be imposed by the State of Pennsylvania, even upon a domestic corporation, engaged in such carriage, it is not too much to say that the *Gross Receipts* decision was received with surprise. It was at once felt that the distinction thus drawn between freight and the money paid for carrying freight was unsound in principle, and that the decision must soon be overruled. Even at the first, its force was much weakened by the strong dissent of

**Taxation of
gross receipts
—Interstate
commerce.**

**Railway
Gross Re-
ceipts case
examined.**

three judges, but, of course, it bound all inferior courts, whatever their opinion of its reasoning might be, and it was followed here in the cases above cited.

"Since 1872, however, several cases on the subject of interstate commerce have been decided by the supreme court of the United States, in which the reasoning of the court opposed both the conclusion and the logic of the earlier decision; and finally in *Fargo v. Michigan*, 121 U. S. 230, the Railway Gross Receipts case was taken up by name for consideration. This case was decided in April, 1887, while the last case on this subject was decided by the supreme court of Pennsylvania in June, 1885. Mr. Justice MILLER easily and plainly distinguished the case in 15 Wall. from the case then before the court, and would naturally have then dismissed it without further discussion of its authority had been still unquestioned; but he went on to say, with much significance, and with an evident reference to the facts of the earlier case: 'The proposition that the States can, by way of a tax upon business transacted within their limits, or upon the franchises of corporations which they have chartered, regulate such business or the affairs of such corporations, has often been set up as a defence to the allegation that the taxation was such an interference with commerce as violated the constitutional provision now under consideration. But where the business so taxed is commerce itself, and is commerce among the States or with foreign nations, the constitutional provision cannot thereby be evaded, nor can the States, by granting franchises to corporations engaged in the business of the transportation of persons or merchandise among them, . . . acquire the right to regulate that commerce, either by taxation or in any other way.' This was a sufficiently plain declaration that the second ground on which the tax was rested in 15 Wall., viz., that it was a franchise tax, could not be maintained, if the receipts sought to be taxed were derived from interstate commerce, and were taxed as receipts from transportation.

"*Fargo v. Michigan* was followed at the same term by *Philadelphia & S. Steamship Co. v. Com.*, 122 U. S. 326, which was a case substantially identical in principle with the case of the Railway Gross Receipts. In each the defendant was a Pennsylvania corporation, and in each the tax was imposed by Pennsylvania upon its gross receipts, including those derived from transportation between this State and points beyond its limits. The differences were—First, that one defendant was a railroad company, and the other was a steamship company, this difference being immaterial, since both were engaged in the business of transportation; and second, that the act of 1868 taxed the railroad company upon its gross receipts from all sources, while the act of 1877 taxed the

Fargo v.
Michigan
examined.

Philadelphia
& S. Steam-
ship Co. v.
Com. exam-
ined.

steamship company only upon its gross receipts for tolls and transportation, telegraph business, and express business, this, too, being immaterial from the present point of view. The Commonwealth naturally argued that the case in 15 Wall. was controlling, and that no rational distinction could be drawn between that decision and the case of the steamship company then before the court; and, as we understand the opinion, which was delivered by Justice BRADLEY, no serious effort is made to draw such a distinction. On the contrary, he expressly declares (122 U. S. 342), that 'a review of the question convinces us that the first ground on which the decision in State Tax on Railway Gross Receipts was placed is not tenable;' and, as the second and only other ground had already been declared not to be a good one in *Fargo v. Michigan*, the decision itself would seem to be left with scanty support. But Mr. Justice BRADLEY goes on to speak also of this second ground. While he does not think that the tax imposed by the act of 1877 was a franchise tax, he says with emphasis: 'It certainly could not have been intended as a tax on the corporate franchise, because by the terms of the act it was laid equally on the corporations of other States doing business in Pennsylvania. If intended as a tax on the franchise of doing business, which in this case is the business of transportation in carrying on interstate and foreign commerce, it would clearly be unconstitutional.' Further, speaking of the general subject of taxes upon interstate commerce, he says (112 U. S. 336), 'If, then, the commerce carried on by the plaintiff in error in this case could not be constitutionally taxed by the State, could the fares and freights received for transportation carrying on that commerce be constitutionally taxed? If the State cannot tax the transportation, may it nevertheless tax the fares and freights received therefor? Where is the difference? Looking at the substance of things, and not at mere forms, it is very difficult to see any difference. The one thing seems to be tantamount to the other. It would seem to be rather metaphysics than plain logic for the State officials to say to the company: "We will not tax you for the transportation you perform, but we will tax you for what you get for performing it." Such a position can hardly be said to be based on a sound method of reasoning.'

"If the case thus referred to, with others therein cited, and the language quoted, do not completely overthrow the authority of the State tax on Railway Gross Receipts, we are at a loss to understand their meaning. Believing that they do, we think it our duty to disregard that decision, and to follow the latter cases in holding that a statute which attempts to tax the gross receipts of transportation companies, derived in the language of the act before us, 'from tolls and transportation, telegraph business, or express,' is not valid, so far as such receipts are derived

**Railway
Gross
Receipts
case over-
ruled.**

from commerce between points within and points without the State. It is valid, however, as to all receipts derived from commerce which is internal,—that is, the commerce which is wholly confined within the limits of the State,—for this is as much under its control as foreign or interstate commerce is under the control of the general government (*Sands v. Improvement Co.*, 123 U. S. 295), and therefore the State may lawfully tax receipts from such internal commerce, although the company doing the business is a foreign corporation. If such corporation comes into Pennsylvania and carries on here the business of internal commerce, its receipts therefrom may be taxed precisely as if it were a domestic corporation. These principles require us to say that the defendant is only taxable upon \$226,090.78 of its gross receipts for the period in question. The rest, being the sum of \$516,544.25, was received for transportation between points within and points without the State, or between points without the State but passing through the State on its way, and therefore cannot be taxed by this Commonwealth.

“One further word may be necessary. Included in the sum of \$516,544.25 is the sum of \$27,616.63 for transportation of coal from the defendant's mine to Honesdale, and there detained while in transit. This coal was all destined for points outside the State when it left the mines. Lack of storage room at points of destination, or some other reason, detained it temporarily at Honesdale, but its place of destination continued to be outside the State, and thither it was ultimately carried. The transportation, therefore, had actually begun, the property was in the custody of the carrier, and, as the article was destined for a point without the State, interstate commerce was already being carried on. The temporary stoppage was not an abandonment of the original movement, and the coal was therefore as fully protected at Honesdale as when in motion upon the company's cars. *Coe v. Errol*, 116 U. S. 517. The amount due the Commonwealth is as follows:

Eight-tenths of one per cent. upon \$226,090.78.....	\$1,808 72
Interest from May 30, 1887, to April 2, 1888.....	182 67
Attorney general's commission.....	90 40
Total	\$2,081 79

“For which sum we direct judgment to be entered, if exceptions are not filed according to law.”

Both plaintiff and defendant bring error.

M. E. Olmsted for Delaware and Hudson Canal Company.

W. S. Kirkpatrick, Atty. Gen. and *John F. Sanderson*, Dep. Atty. Gen. for the Commonwealth.

PER CURIAM.—We have examined with care the opinion of of the learned judge who tried the above stated case in the court

below, and we are satisfied that the conclusions reached by him are correct; nor do we deem it advisable to attempt to add anything to what he has so well said.

The judgment is affirmed. '

Taxation of Gross Receipts—Interstate Commerce.—Although the franchises of a company engaged in the business of a common carrier are derived from the State, the State has not the power to tax the gross receipts of any such carrier for the transportation of passengers or freight between terminal points, one or both of which are without the State. Goods transported between two terminal points both of which are within the State, are subject to the taxation by the State although part of the route is situated in an adjoining State. The carriage of goods by such route is not interstate commerce. *Commonwealth v. Lehigh Valley R. Co. (Pa.)*, 17 Atl. Rep. 179.

See *Ratterman v. Western Union Tel. Co.*, 127 U. S. 411; s. c., 21 Am. & Eng. Corp. Cas. 1, note 10; *Northern Pac. R. Co. v. Raymond*, *post*, p. 379.

ATLANTIC AND PACIFIC R. CO.

21.

LESUEUR, *County Treasurer.*

(*Arizona Supreme Court, September 18, 1888.*)

Taxation—Exemption—Right of Way.—The exemption of a right of way from taxation does not exempt the superstructure, *i. e.*, a railway, thereon.

Same—Power of Territory—Franchise—Interstate Commerce.—Taxation of the franchise of a railway granted by act of congress, by the territories, is not in conflict with the constitutional grant to congress of the power to regulate commerce among the several States.

Same—Federal Agency.—Nor is the taxation by a territory of the franchise of a corporation incorporated by act of congress unconstitutional, as the taxation of a federal agency, in the absence of such restriction in the grant of the taxing power to the territory, as congress may permit the territory to do so.

Same—Rolling Stock—Situs.—For the purposes of taxation, the *situs* of the rolling stock of a railway company is where it is habitually used. If the specified property be constantly changing, the amount may be fixed by the average amount so used.

Same—Exemption—Construction.—Exemption from taxation is the exception to the rule of taxation, and can be sustained only from the strictest construction.

Same—Right of Way—Construction.—The words "right of way" in a grant describe the tenure, not the land, granted.

W. C. Hazeldine (Sumner Howard and E. M. Sanford of counsel) for appellant.

Baldwin & Baldwin for appellee.

BARNES, J.—This was a suit to enjoin the collection of taxes levied upon the property of the plaintiff by the proper revenue officers of Apache county. The ground upon which the injunction

is sought is that the assessment was illegal. The levy was made upon the improvements on a certain strip of land in said county, 200 feet wide and 112 miles long, upon the center line of which the railroad of plaintiff is situate; the improvements consisting of culverts, wooden bridges, grading, trestles, rock, earth cuts, and fills; also 265,000 wooden cross ties, steel and iron rails, fish plates, bolts, and spikes thereon; also steam pumps and water tanks, section houses, depot buildings, round house, hotel, coal chutes, side tracks, blacksmith shops thereon; also twelve cottages, used by employes, 500 feet from the track; the franchise of plaintiff to do business and collect freights and fares, except business with the United States; also a telegraph plant along the said line; also safes and office furniture; also railway supplies; also fifteen locomotives, four coaches, two mail and express cars, one hundred box cars, seventy-five flat cars, seven caboose cars, sixteen living cars, fifteen hand cars, coal on hand, and cross ties.

Statement
of case.

Against the legality of this assessment it is urged, first, that the superstructure and improvements, buildings, etc., on what is called the "right of way" of the plaintiff is exempted from taxation by its charter. By its charter (14 U. S. St. at Large, 292), "the right of way through the public lands is granted to plaintiff for the construction of a railroad and telegraph, to the extent of one hundred feet on each side of said road, including necessary grounds for station buildings, shops, switches, turn tables, and water stations; and the right of way shall be exempt from taxation within the territories of the United States." It is said that this is a grant of an interest in the real estate, taken for a right of way, and that whatever is attached to it becomes a part of the realty, and, as the right of way is exempt, that the exemption carries with it whatever has become a part of the realty. No one can question that a right of way is an interest in the realty; nor that culverts, bridges, railway switches, depot buildings, etc., thereon, become part of the realty. He who has title to the right of way has title to the superstructure. They would pass by grant, and would be subject to the laws regulating the conveyance of real estate, including the statute of frauds. All this will be conceded. But does it follow that the exemption of the right of way exempts all appurtenances afterwards attached thereto? This is the question. The supreme court of Montana seems to hold that it does, though a careful consideration of the decision will show that this conclusion is *dictum*. Northern Pac. R. Co. v. Carland, 3 Pac. 141; 17 Am. & Eng. R. R. Cas. 364. The charter of the Northern Pac. R. Co. is in the same words as the Atlantic & Pac. R. Co.'s charter. In that case the tax was levied upon an assessment of "twenty miles of railroad and rolling

Taxation—
Exemption
of "right
of way."

stock." The assessment of twenty miles of railroad did include the right of way, as the argument of that case and the cases cited demonstrate conclusively. And the court rightly held that the assessment was illegal, in that the exempted right of way was included in it. This was all that was before the court, and is all that was really decided. The cases cited do not lead beyond this conclusion. Appeal of North Beach & M. R. Co., 32 Cal. 506. This case holds that a right of way is an easement in the land, and that the estate is real property, and may be taxed as such. The opinion is quoted at large in the Montana case. We have never seen the principle here stated doubted. Washb. Easem. 5, says: "An easement always implies an interest in the land. It may be a freehold or a chattel one, according to its duration. It is real property, and it is created by grant." In this it differs from a licence. Rowbotham v. Wilson, 8 El. & Bl. 157; *Ex Parte* Coburn, 1 Cow. 570; Heaton v. Ferris, 1 Johns. 146; Wolfe v. Frost, 4 Sandf. Ch. 86; Foster v. Browning, 4 R. I. 51; Buckeridge v. Ingram, 2 Ves. Jr. 654; Binney's Case, 2 Bland 145; Bowman v. Wathen, 2 McLean 385; Gas Co. v. Thurber, 2 R. I. 21; Albany & S. R. Co. v. Osborn, 12 Barb. 225; Albany & W. S. R. Co. v. Canaan, 16 Barb. 247; Sangamon & M. R. Co. v. Morgan Co., 14 Ill. 166; Williams v. New York Cent. R. Co., 16 N. Y. 100; Mahon v. New York Cent. R. Co., 24 N. Y. 658; Wager v. Troy Union R. Co., 25 N. Y. 526; Waterloo v. Auburn & R. R. Co., 3 Hill 569; People v. Cassity, 46 N. Y. 46; New Haven v. Fair Haven & W. R. Co., 38 Conn. 422; Chicago v. Baer, 41 Ill. 306; Loan & Trust Co. v. Hendrickson, 25 Barb. 494; 1 Washb. Real Prop. 3. These, and many other authorities that may be cited, clearly point out the law as stated. An assessment of twenty miles of railroad was an assessment of the real estate, and included the right of way and the superstructure thereon. How we are to conclude from these premises, however, that the exemption of a right of way *ex vi termini* exempts from taxation the superstructure, we cannot see. It is *non sequitur*. Exemption from taxation is an exception from the general rule that all property shall be taxed equally. He who asserts that his property is exempt must show it by the clear letter of the law. No intentions are in his favor. No construction will aid him.

Construction of statute granting exemption from taxation. Every doubt will be resolved against him. He does not stand favored, as does a grantee or a mortgagee. The meaning of words is not broadened to include him. Though you will construe liberally when you tax, you must construe strictly to exempt. You must point it out in the words, "*Ita lex scripta est*," free from doubt or ambiguity. Cooley, Tax'n, 204; Philadelphia & W. R. Co. v. Maryland, 10 How. 376; 10 Am. & Eng. R. R. Cas. 792; Bank v. Billings, 4 Pet. 514; Vicksburg, S. & P. R.

Co. v. Dennis, 116 U. S. 665; Cottle v. Spitzer, 65 Cal. 459; Weller v. Hughes, 11 Pac. Rep. 122. SHIELDS, J., for this court, says: "No property within the territory is exempt from the operation of these revenue laws, unless put beyond them, designedly and unequivocally, by the legislative or other sovereign power. A mere inference that certain property is exempt from taxation will never do; nor will it be assumed, unless the language used is too clear to admit of doubt." Chicago, B. & K. C. R. Co. v. Guffey, 120 U. S. 569; 29 Am. & Eng. R. R. Cas. 200: "It is the settled doctrine of this court that an immunity from taxation by the State will not be recognized, unless granted in terms too plain to be mistaken."

By this rule, then, we come to a construction of section 2 of the plaintiff's charter. The lands of plaintiff are not assessed; nor is the right of way as such. Improvements, culverts, bridges, ties, iron, buildings, etc., located on the right of way, are. But were these exempted by the exemption of the right of way? Had congress so intended, it would have been easy to have said so; the addition of a word or two would have made it certain. Congress granted a right of way over the public lands, and in the same section it exempts what is granted from taxation. It did not grant improvements, culverts, bridges, buildings, iron, ties, etc. This was property to be placed there afterwards by the grantees. Shall we infer that it exempted what it did not grant, when it does not say so or use words looking in that direction? We think not. We should stand by the letter of the law, in favor of equality of taxation. We will not infer that congress has done so unjust a thing as to expose an immense property thereafter to be created where it would demand the constant protection of all the machinery of organized society at a great expense, and then relieve it of its just burden of taxation in order to defray these expenses. It was projected into almost a wilderness, where inhabitants were few; where the title to the lands was in the United States, free from taxation; where the burdens of sustaining social order would at best be heavy. Such a property as this would greatly increase these burdens. It cannot be thought for a moment that congress intended by the use of the innocent words, "and the right of way shall be exempt from taxation," to do such a monstrous wrong as to exempt the millions the grantees should put upon the right of way from taxation for all time. It is further urged with great force, skill, and ability that the grant of right of way to a railroad is *sui generis*, and is in fact a grant of the fee; and, if so, to exempt the fee so granted exempts the superstructure. It is said that the term "right of way" is used to describe the land granted—that is, that

Construction of charter.

Grant of "right of way" does not convey the fee.

these are words of description, rather than of tenure. We cannot concur with this view, and no authority can be found which so holds. We must conclude that the words are used in their common, well-known, and universally accepted legal meaning, and that it was a grant of an easement as defined by the law. It was not a grant of the fee. Should the company see fit to change its line and abandon its present alignment at any point, the right of way so abandoned would revert to the grantor.

Again, it is urged that the assessment of the franchise of this company is the taxing of a federal agency, and hence it may not be taxed; and the case of Philadelphia & S. M. Steamship Co.

v. Pennsylvania, 122 U. S. 326, is cited. That case and the authorities cited therein hold that the State may not tax a federal agency created by act of congress, and also that a State may not, by taxation, interfere with interstate commerce. This is a power specially delegated by the constitution. "Congress alone can deal with such transportation; its nonaction being equivalent to a declaration that it shall remain free from burdens imposed by State legislation." BRADLEY, J., in case *supra*. *California v. Central Pac. R. Co.*, 127 U. S. 41. In the case at bar congress has acted. The act says this right of way shall be exempt from taxation. *Inclusio unius, exclusio alterius*. Congress excludes or exempts only the right of way; hence the inference is that all else is not excluded or exempted. The constitution declares that "congress shall have power to regulate commerce with the foreign nations and among the several States," etc. Article I, § 8. This takes the power from the States, and delegates it to congress. Congress might, therefore, tax or authorize the taxation of the franchises of interstate carriers. But the act of the territory is the act of congress. Rev. St. U. S. § 1851. "The legislative power of this territory extends to all rightful subjects of legislation not inconsistent with the constitution and laws of the United States. No tax shall be imposed upon the property of the United States; nor shall the lands or other property of non-residents be taxed higher than the lands or property of residents." This is the only limitation placed upon the taxing power of the territory, and should be held to be a delegation by congress of its admitted power to the territories to tax all else. A franchise is property, has value, and it is not prohibited to tax it. To do so is not inconsistent with the constitution or laws of the United States. Section 1850, Rev. St. U. S., enacts that "all laws passed by the legislative assembly shall be submitted to congress, and if disapproved, shall be null and void." And may we not add, "otherwise shall have full force and effect?" February 12, 1875, the territory enacted (Comp. Laws, § 2005) that "all property of every kind and nature whatsoever within this territory shall be

Taxation
of federal
agency.

subject to taxation, except," and a franchise of a corporation is not in any of the exceptions. We must conclude, therefore, that congress has granted to the territory the right to tax franchises, whether they be federal agencies or the means of interstate commerce. Congress may withdraw this power whenever it sees fit, and may disapprove of this legislation. Until it does so, it must be enforced, as the law of the territory. Congress will carefully guard all of its agencies, and see to it that the territories do not impair their efficiency, and also will look well after the commerce among the States, that it be not obstructed, and will act when occasion requires. Until it does, it must be regarded as having approved of this legislation.

Again, it is contended that all of this rolling stock has its *situs* and domicile in Albuquerque, N. M., and was not subject to taxation within said county. It appears that the headquarters of the western division of plaintiff's railroad was at Albuquerque, N. M., and that it had over 1,000 cars and engines in constant use between Albuquerque, N. M., and Mojave, Cal., a distance of over 800 miles, moving passengers and freight. Plaintiff returned fifteen locomotives, 16 office cars, and 7 caboose cars as constantly in Apache county; 181 cars were added by the assessor. This question is set at rest by the supreme court of the United States in *Marye v. Baltimore & O. R. Co.*, 8 Sup. Ct. Rep. 1037 (April 23, 1888): "It is quite true as the *situs* of the Baltimore & Ohio Company is in the State of Maryland, that, also, upon general principles, is the *situs* of all its personal property; but for the purposes of taxation, as well as for other purposes, that *situs* may be fixed in whatever locality the same may be brought and used by its owner, by the law of the place where it is found." "And such a tax might be properly assessed and collected in cases like the present, where the specific and individual items of property so used and employed were not continuously the same, but were constantly changing, according to the exigencies of the business. In such cases the tax might be fixed by an appraisement and valuation of the average amount of the property thus habitually used."

Taxation—
Situs of
rolling
stock.

In the above case the *situs* was conceded to be in Maryland. That State granted its charter. In this case, it is by no means conceded that the place of the "headquarters of the western division" is the *situs* of the company. The charter designates no place of general business. For the purposes of taxation, its *situs* must be wherever business is done, and its personal property engaged in that business shall be subject to the taxing laws of the place where it is so used. The above decision makes it unnecessary to review the long list of cases cited, as this, the last case, settles all conflict and resolves all doubt.

It is insisted, also, that the telegraph lines erected on the right of way are exempt, for the same reasons as depots, etc. We think not, for the reasons given heretofore. It is clear that section 3, c. 53, Comp. Laws, Ariz., refers to telegraph lines constructed under the provisions of that act. The lines of this plaintiff are constructed by authority of the act of congress granting its charter. Under what circumstances a court of equity will entertain jurisdiction to enjoin the collection of a tax, see the case of *Campbell v. Bashford*, 16 Pac. Rep. 269, where the question is discussed by this court.

We see no error in this record, and the judgment of the district court is affirmed.

WRIGHT, C. J., and PORTER, J., concur.

Taxation of National Corporations.—See note, 24 Am. & Eng. R. R. Cas. 24; *California v. Cent. Pac. R. Co.*, 127 U. S. 1; s. c., 33 Am. & Eng. R. R. Cas. 451; *Southern Pac. R. Co. v. California*, 118 U. S. 109; s. c., 25 Am. & Eng. R. R. Cas. 525; *Allen v. Texas & Pac. R. Co.*, 24 Am. & Eng. R. R. Cas. 18; *Santa Clara v. Southern Pac. R. Co.*, 13 Ib. 182, note, 244; note 13 Ib. 377.

Taxation of Rolling Stock.—See *State v. St. Louis County*, 29 Am. & Eng. R. R. Cas. 192; *Pullman Palace Car Co. v. State of Texas*, 64 Tex. 274; s. c., 29 Am. & Eng. R. R. Cas. 194; note, 24 Am. & Eng. R. R. Cas. 626, 627; *Vicksburg & M. R. Co. v. State*, 62 Miss. 105; s. c., 23 Am. & Eng. R. R. Cas. 729; *Fargo v. Auditor General*, 22 Ib. 216; *Pullman Southern Car Co. v. Nolan*, 17 Ib. 398, note, 405; *Comstock v. Grand Rapids*, 17 Ib. 457; *Baltimore & O. R. Co. v. Allen*, 17 Ib. 461, note, 466; *Raleigh & G. R. Co. v. Wake County*, 17 Ib. 466.

SAN BENITO COUNTY

v.

SOUTHERN PACIFIC R. Co.

(*California Supreme Court, December 13, 1888.*)

Municipal Ordinance—Licence—Validity.—An ordinance by a county requiring a railroad company to take out and pay for a licence to continue its business of carrying persons or freight for hire by means of railroad cars in the county, is void, when the charter and franchise of the company are derived by grant of the Congress of the United States.

APPEAL from Superior Court, San Benito County.

N. C. Briggs, J. B. Lamar, Walter A. Lamar, J. E. Foulds for appellant.

N. A. Hawkins, District Attorney and *B. B. McCroskey (McCroskey & Hunder, of counsel)* for respondent.

PATTERSON, J.—In view of the decisions of the supreme court

of the United States in the cases of *State v. Central Pac. R. Co.*, and *Same v. Southern Pac. R. Co.*, rendered April 30, 1888, 33 Am. & Eng. R. R. Cas. 451, it would seem useless to follow in this case the decisions of this court in *Central Pac. R. Co. v. State Board of Equalization*, 60 Cal. 35; *Los Angeles v. Southern Pac. R. Co.*, 61 Cal. 59, and *Santa Clara Co. v. Southern Pac. R. Co.*, 66 Cal. 642, 13 Am. & Eng. R. R. Cas. 182, for it is quite clear we think, that the supreme court of the United States would hold, in a proper case, the ordinance before us herein, requiring the defendant to take out and pay for a licence to continue its business of carrying persons or freight for hire by means of railroad cars in the county of San Benito, to be void; and of course we ought always to follow the rule of law laid down by that court, when our judgment, as in the case at bar, may be examined by it on writ of error. *Belcher v. Chambers*, 53 Cal. 643. In the case referred to (*State v. Central Pac. R. Co.*, *supra*) it was held that the defendant therein (defendant herein), having been invested with certain franchises derived from the government of the United States, in connection with other railroad corporations, by certain acts of congress, and having accepted all the terms and conditions of each said acts, and fully complied therewith, "the State of California can neither take them away nor destroy nor abridge nor cripple them by onerous burdens." The court, in this case, further said: "It may undoubtedly tax outside visible property of the company situated within the State. That is a different thing. But may it tax franchises which are the grant of the United States? In our judgment it cannot. . . . No private person can establish a public highway, or a public ferry or railroad, or charge tolls for the use of the same, without authority from the legislature, direct or derived. These are franchises. . . . Corporate capacity is a franchise. . . . How can it be possible that a franchise granted by congress can be subject to taxation by a State without the consent of congress? Taxation is a burden, and may be laid so heavily as to destroy the thing taxed, or render it valueless. As Chief Justice MARSHALL said, in *McCullock v. Maryland*, 4 Wheat. 316: 'The power to tax involves the power to destroy.' Recollecting the fundamental principle that the constitution, laws and treaties of the United States are the supreme law of the land, it seems to us almost absurd to contend that a power given to a person or corporation by the United States may be subjected to taxation by a State. The power conferred emanates from, and is a portion of, the power of the government that confers it. To tax it is not only derogatory to the dignity, but subversive of the powers, of the government, and repugnant to its paramount sovereignty. It is unnecessary to cite cases on this subject. The principles laid down by this court in *McCul-*

**Taxation by
State of
franchise
granted by
congress.**

loch v. Maryland, *supra*, and Osborn v. Bank, 9 Wheat. 817, and Brown v. Maryland, 12 Wheat. 436, and in numerous cases since, which have followed in their lead, abundantly sustain the views we have expressed. It may be added that these views are not in conflict with the decisions of this court in Thomson v. Union Pac. R. Co., 9 Wall. 579, and Union Pac. R. Co. v. Peniston, 18 Wall. 5. As explained in the opinion of the court in the latter case, the tax there was upon the property of the company, and not upon its franchises or operations. *Id.* 25, 37. Taxation of a corporate franchise, merely as such, unless pursuant to stipulation in the original charter of the company, is the exercise of an authority somewhat arbitrary in its character. It has no limitation but the discretion of the taxing power. . . . It only remains to consider whether the Southern Pacific Railroad Company as well as the Central Pacific was invested with any franchise derived from the government of the United States. Of this we think there can be no question. . . . It follows that in each one of the cases now before us the assessment made by the state board of equalization comprised the value of franchises or property which the board was prohibited by the constitution of the State from including therein, and that these values are so blended with the other items of which the assessment is composed that they cannot be separated therefrom. The assessments are therefore void."

In Union Pac. R. Co. v. Peniston, *supra*, the court, referring to McCulloch v. Maryland, *supra*, said: "The tax, therefore, was not upon any property of the bank, but upon one of its operations; in fact, upon its right to exist as created. It was a direct impediment in the way of a governmental operation performed through the bank as an agent. It was a very different thing, both in its nature and effect, from a tax on the property of the bank. No wonder then that it was held illegal. 'It does not extend,' said the chief Justice, 'to a tax paid by the real property of a bank, in common with the other real property in the State, nor to a tax imposed on the interest which the citizens of Maryland may hold in the institution, in common with the other property of the same description throughout the State. But this is a tax on the operations of the bank, and is consequently a tax on the operations of an instrument employed by the government of the Union to carry its powers into execution. Such a tax must be unconstitutional. Here is a clear distinction made between a tax upon the property of a government agent, and a tax upon the operations of the agent acting for the government. In Osborn v. Bank, the tax held unconstitutional was a tax upon the existence of the bank,—upon its right to transact business within the State of Ohio. . . . For this reason the power of the State to direct it was denied; but at the same time it was declared by the court that the local property of the bank might be taxed, and, as in McCulloch v.

Maryland, a difference was pointed out between a tax upon its property and one upon its action. . . . A tax upon their operations is a direct obstruction to the exercise of federal powers."

The contention that the exemption claimed ought not to be implied by the court, in the absence of any legislation by Congress upon the subject of exemption, is answered by the court in *Osborn v. Bank*, *supra*, where it is said: "It is contended that, admitting Congress to possess the power, this exemption ought to have been expressly asserted in the act of incorporation; and, not being expressed, ought not to be implied by the court. It is not unusual for a legislative act to involve consequences which are not expressed. An officer, for example, is ordered to arrest an individual. It is not necessary, nor is it usual, to say that he shall not be punished for obeying this order. His security is implied in the order itself. It is no unusual thing for an act of Congress to imply, without expressing, this very exemption from State control, which is said to be so objectionable in this instance. . . . It is secured by the judicial power alone; that is, the judicial power is the instrument employed by the government in administering this security. . . . Can a contractor, for supplying a military post with provisions, be restrained from making purchases within any State, or from transporting provisions to the place at which the troops were stationed? Or could he be fined or taxed for doing so? We have not yet heard these questions answered in the affirmative. It is true that the property of the contractor may be taxed as the property of other citizens; and so may the local property of the bank. But we do not admit that the act of purchasing, or of conveying the articles purchased, can be under State control."

Not necessary that exemption should be expressed.

It seems to us that the reasoning of the court in the above cases applies with as much force to the licence tax upon the use of the franchise—the operations of the road, and the conduct of its business—as to the tax upon the franchise as property; and that the supreme court of the United States would so hold. Holding this opinion, it is our duty, notwithstanding the opinions of this court upon the same subject hereinbefore referred to, to reverse the judgment and order of the court below, with directions to enter judgment for the defendant.

Licence tax upon franchise.

It is so ordered.

We concur: MCFARLAND, J.; SHARPSTEIN, J.; WORKS, J.

THORNTON, J. (*concurring*).—The rulings of the supreme court of the United States, in the cases cited in the beginning of the foregoing opinion, on the question of the power of the State to

tax the franchises granted by the United States government must control our action in this case. The question is federal; and on such questions the settled law requires that the courts of the State shall conform to the decisions of the highest federal judicial tribunal. The licence tax in question herein is one that affects the franchises enjoyed by the defendant company under a grant or grants from the federal government. It is a tax on the right of this company to carry on its business under the federal grant, and comes within the judgments of the United States supreme court in the cases cited. Under the constitution of this State, which requires all taxation to be equal and uniform throughout the State, it must be supposed that the legislature would not impose or authorize the imposition of any taxes by any county or other political subdivision of the State, whether in the nature of property or licence taxes, which would destroy or render valueless the business of any railroad corporation, or cripple such corporations by onerous burdens. The guaranty of fair and just taxation is found in the constitution of the State. Taxation by a county must be equal and uniform, at least as to all persons engaged in the same business in the county; and such a guaranty will protect railroads in a county from unfair or unjust or oppressive taxation which would tend to destroy their business or cripple it, or interfere with their right to do business, as it protects individuals on whom such taxes are imposed. The amount of the tax is so small in the case before us that it cannot be considered onerous. But in the view taken by the supreme federal tribunal, the foregoing considerations are of no weight. The power of the State to tax is held not to exist at all, without regard to the fact whether the tax is so trifling as not to in any degree be onerous, or equal or uniform on all persons, whether natural or artificial, engaged in the business of carrying persons or freight for hire, or by means of railroad cars. Following then the judgments of the supreme court of the United States in the cases above cited, we must hold that the licence tax under consideration was levied without authority of law, and must be held void.

With the foregoing observations, I add that I concur in the foregoing opinion and judgment

Municipal Ordinance—Licence Tax.—The town of Reidsville passed an ordinance levying a fifty dollar tax on every railroad company running its road to its corporate limits. The Piedmont R. Co. was a corporation organized under the laws of North Carolina, whose track ran through the town, but that railroad was in the possession of the Richmond & Danville R. Co. as lessee. It was held that the tax was valid and was not open to the objection that it infringed the constitution of the United States. The court said: "It is in no sense a tax upon interstate commerce, that is, upon freight or passengers conveyed out of this State into another State, or brought from the latter into this State, nor upon the coaches and cars, instruments of such commerce employed in such transportation. The tax is upon the corporate body created by the State and doing business within the corporate limits of the town, and this liability cannot be evaded

by the fact that the road transports beyond as well as within the boundaries of the State. It is such commerce as is carried on between the States as a distinct species of taxable property that is protected by the constitution of the United States from State assessment, when separately taxed or when intermingled with that which is purely and solely State. In *State Tax on Railway Gross Receipts*, 15 Wall. 284, a tax upon the gross receipts of a railroad, though entering into the aggregate part of which is derived from a transportation beyond the State lines, is held not to be an evasion of the exclusive right to regulate commerce between the States; and the distinction is taken between a tax upon freights carried between States because of their carriage, and a tax upon the freights of such transportation after they have become intermingled with the other property of the carrier.

"Again, a tax of one-fourth of one per cent. in addition to other taxes upon the value of every share of its stock with a proviso that, when the road, which is so taxed, lay partly within and partly without the State, the company should only be responsible to the State levying the tax upon such number of shares as would be in the same ratio to the whole as the number of miles of its track in the State bore to the entire line of the road, was upheld as not interfering with interstate commerce. The *Delaware Railroad Tax*, 18 Wall. (U. S.) 206. So it has been decided that a railroad 455 miles in length of which forty-two only were within the State that incorporated the company was "doing the business within the latter State and subject to a tax imposed upon all railroad companies doing business within the State and upon whose road freight may be transported." *Erie Railway Co. v. Pennsylvania*, 21 Wall. 492. "It is then manifest that the municipal tax imposed by the defendant invades no prohibitory provision contained in the constitution of the United States." *Piedmont R. Co. v. Town of Reidsville*, N. Car. supreme court, September term, 1888.

NORTHERN PACIFIC R. CO.

v.

RAYMOND, *Treasurer*.

(*Dakota Supreme Court, October 13, 1888.*)

Taxation—Gross Receipts—Interstate Commerce.—The Dakota act of March 9, 1883, which provides for the levy and collection of a percentage of the gross earnings of railroad companies in lieu of other taxes, is unconstitutional and invalid, in so far as it imposes a tax upon the transportation of freight or passengers to or from points outside the State, such traffic being interstate commerce subject only to the regulations of congress.

APPEAL from District Court, Cass County.

Suit for injunction brought by the Northern Pacific Railroad Company against James W. Raymond, treasurer of the Territory of Dakota. Plaintiff's amended complaint was as follows: "(1) That said plaintiff is now, and at all times hereinafter named was, a corporation duly organized and existing under and by virtue of that certain act of congress approved July 2, 1864, entitled 'An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound, on the Pacific coast, by the northern

**Amended
complaint.**

route,' and under those certain acts and joint resolutions of congress relating to the same subject matter. (2) That under and by virtue of the powers conferred on it by said acts and joint resolutions, said plaintiff has constructed and owns and operates, divers railroads operated by steam power in the Territory of Dakota, to wit, that certain railroad, known as the Northern Pacific Railroad, which was been operated for more than five years prior to January 1, 1887; that certain railroad known as the Northern Pacific, Fergus & Black Hills railroad, which has been operated for a period of less than five years prior to January 1, 1887; that certain railroad, known as the Fargo & Southwestern Railroad, which has been operated for a period of less than five years prior to January 1, 1887; that certain railroad, known as Sanborn, Cooperstown & Turtle Mountain Railroad, which has been operated for a period of less than five years prior to January 1, 1887; and that certain railroad, known as the James River Valley Railroad, which has been operated for a period of less than five years prior to January 1, 1887. (3) Heretofore, to wit, on the 9th day of March, A.D. 1883, the legislature of the Territory of Dakota enacted a certain act entitled 'An act to provide for the levy and collection of taxes upon the property of railroad companies in this Territory,' which, among other things, provided as follows, to wit: 'Section 1. Percentage of gross earnings to be paid in lieu of other taxes. In lieu of all other taxes upon any railroads, except railroads operated by horse power, within this Territory, or upon the equipment or appurtenances, or appendages thereof, or upon any other property situated in this Territory, belonging to the corporation owning or operating such railroads, or upon the capital stock or business transaction of such railroad company, there shall hereafter be paid into the treasury of this Territory a percentage of all gross earnings of the corporation owning or operating such railroad arising from the operation of such railroad as shall be situated within this Territory, as hereinafter stated; that is to say, every such railroad corporation or person operating a railroad in this Territory shall pay to said treasurer each year, for the first five years after said railroad shall be or shall have been operated in whole or in part, two (2) per centum of such gross earnings; and for and in each and every year after the expiration of the said five years, three, (3) per centum of the said gross earnings; and the payment of such per centum annually, as aforesaid, shall be and is in full of all taxation and assessments whatever upon the property aforesaid. The said payments shall be made one-half ($\frac{1}{2}$) on or before the 15th day of February, and one-half on or before the 15th day of August, in each year; and for the purpose of ascertaining the gross earnings aforesaid an accurate account of such earnings shall be kept by said company, an abstract whereof shall be furnished by said company to the treasurer of this Territory on or before

the 1st day of February in each year; the truth of which abstract shall be verified by the affidavits of the treasurer and secretary of said company. And for the purpose of ascertaining the truth of such affidavits and the correctness of such abstracts full power is hereby vested in the governor of this Territory, or any other person appointed by law, to examine under oath the officers and employes of said company, or other persons, and if any person so examined by the governor, or other authorized person, shall knowingly or wilfully swear falsely concerning the matters aforesaid, every such person is declared to have committed perjury. And for the purpose of securing to the Territory the payment of the aforesaid per centum it is hereby declared that the Territory shall have a lien upon the railroad of said company, and upon all property, estate, and effects of said company whatsoever, personal, real, or mixed. And the lien hereby secured to the Territory shall have and take precedence of all demands, decrees, and judgments against said company.

Sec. 2. Where company shall fail to make return. If any railway company in this territory shall fail to make return of its gross earnings as aforesaid, or of any part thereof, at the time and manner provided by law, and such default shall continue during the period of thirty (30) days, such company shall be subject to a penalty in an amount equal to twenty-five (25) per cent. of the tax imposed upon such company by this act; and the treasurer of the Territory shall forthwith ascertain the amount of such tax justly due from such company, as nearly as may be, from such evidence as may be available, and shall thereupon collect tax as so ascertained, together with the said penalty thereon. The amount of tax ascertained by the Territorial treasurer, as in this section provided, shall, together with the said penalty thereon, be by him entered in the books of his office; and such entry, when so made, shall stand in the place of the report required by law to be made by such company, and shall in all courts within this Territory be evidence of the amount of such tax and penalty, and of the other facts stated therein, in pursuance of this act.

Sec. 3. Neglect to pay taxes. In case any railroad company shall fail or neglect to pay the taxes reported by it to be due, in pursuance of this act, for the period of thirty (30) days after the same shall have become due by the terms thereof, in such case there shall be added to the amount of such tax ten (10) per centum thereof as a penalty for such failure or neglect to pay.

Sec. 4. Territorial treasurer to distrain. At any time after the expiration of the period of thirty (30) days after any tax has become due and payable under the provisions of this act, the Territorial treasurer, or his deputy, shall distrain sufficient goods, chattels, or other movable property, if found within this Territory, to pay the taxes or per centum due from such corporation, together with the penalty thereon herein provided, and shall immediately advertise the sale

of the same in at least three newspapers published within this Territory, stating the time when and the place where such property shall be sold. Such sales shall take place at some point on the railroad of such delinquent company, and at least four (4) week's notice of the time and place of such sale shall be given. Such delinquent company, its successors and assigns, may pay any such taxes and penalty at any time before the sale of property distrained, as herein provided; and thereupon further proceedings in connection with such distress shall cease, and the property distrained be surrendered to the owner thereof.' (4) The total gross earnings of the said plaintiff for the year 1886 on the business of said railroads were \$2,654,756.31, distributed as follows to wit: On the Northern Pacific Railroad, \$2,309,594.25; on the Northern Pacific, Fergus & Black Hills Railroad, \$34,327.13; on the Fargo & Southwestern Railroad, \$192,594.47; on the Jamestown & Northern Railroad, \$69,129.97; on the Sanborn, Cooperstown & Turtle Mountain Railroad, \$29,936.36; and on the James River Valley Railroad, \$19,213.62. Said total gross earnings, to wit, said sum of \$2,654,756.31, were composed and made up of earnings of said plaintiff on interstate business and commerce; that is to say on business and commerce originating or beginning without said Territory, or terminating without said Territory, and earnings of said plaintiff on business that was not interstate business or commerce but was strictly local to said Territory; that is to say, on business or transportation of persons and freight which originated or began at some point or points within said Territory, and terminated or ended at some point or points within said Territory. The part or portion of said total gross earnings, to wit, of the sum of \$2,654,756.31, which said plaintiff earned for and upon business or transportation of persons and property, or otherwise, which originated and began within said Territory, and terminated and ended within said Territory, did not exceed the sum of \$400,000, and was approximately about as follows, to wit: On the Northern Pacific Railroad, \$346,432.38; on the Northern Pacific, Fergus & Black Hills Railroad, \$5,149.07; on the Fargo & Southwestern Railroad, \$28,889.17; on the Jamestown & Northern Railroad, \$10,369.49; on the Sanborn, Cooperstown & Turtle Mountain Railroad, \$4,490.52; and on the James River Railroad, \$2,882.79. The remaining portion of said total gross earnings, to wit, about the sum of \$2,259,425.68, were earnings which were earned by plaintiff on business that was interstate commerce; that is to say, on business or transportation of persons and property between points situated wholly without said Territory; or points without and points within said Territory; or points within and points without said Territory. Heretofore, to wit, on the 5th day of March, A.D. 1887, said plaintiff duly paid to the defendant, treasurer as aforesaid, the sum of \$38,095.31

as and for taxes on its earnings under the terms and provisions of the act last mentioned. (5) Heretofore, to wit, on the 15th day of August, 1887, the said defendant, treasurer as aforesaid, demanded of said plaintiff the sum of \$38,095.31, which he, the said defendant, pretended was due and payable by virtue of said act; but thereupon said plaintiff refused to pay the said sum, or any part thereof. (6) Afterwards, to wit, on November 4, 1887, the said defendant, treasurer as aforesaid, at Fargo, Cass county, Dak., did wrongfully and unlawfully levy a pretended distress upon, and seized and took possession of, certain personal property then and there owned by and in the possession of said plaintiff, to wit: One Mogul locomotive, No. 147; one Mogul locomotive, No. 79; one Standard locomotive, No. 347; one Standard locomotive, No. 185; one Mogul switch engine No. 299; one Standard engine, No. 159; one Standard engine, No. 118; one switch engine, No. 52,—of great value, to wit, of the value of \$64,000.00,—pursuant to the provisions of said act, and to satisfy the pretended taxes aforesaid, to wit, the sum of \$38,095.31, together with a certain pretended penalty thereon of \$3,809.53; and has ever since remained in the possession of the same. (7) Afterwards, to wit, on November 4, 1887, the said defendant, treasurer as aforesaid, caused an advertisement to be, and the same was, published in three newspapers published in said Territory, that he, the said defendant, would sell said personal property at the court house in Fargo, Dak., on the 6th day of December, A.D. 1887, at 10 o'clock, A.M., to satisfy said pretended tax and penalty as provided in said section 4 of said act. (8) That, unless restrained by the order of this court, said defendant will, as plaintiff is informed and believes, sell said property at the time and place mentioned in said advertisement, to wit, on December 6, A.D. 1887, at 10 o'clock, A.M., at the court house in Fargo, Dak., to satisfy said pretended tax and penalty. (9) That said plaintiff is a common carrier of goods and passengers for hire in said Territory, and the said personal property, to wit, the said engines, are essential and necessary to enable said plaintiff to carry on its business as a common carrier, and to discharge its duties as such to the public; that, if said engines are sold as aforesaid by said defendant, said plaintiff will be deprived of the possession thereof, and will be deprived of the use thereof in its said business as a common carrier; and it will not be able to purchase or procure other engines in their place in less time than a year, for the reason that it will have to purchase such other engines from the manufacturers of railroad locomotives and engines in the United States. And all of said manufacturers now have orders for engines which will require at least a year to fill, and on account of such pressure of business none of them will be able to furnish said plaintiff with any engines in less time than a

year; by reason of which the sale of said engines will inflict great and irreparable injury on the business of said plaintiff, and will cause said plaintiff great pecuniary loss, the exact amount of which cannot be computed, and will to a great extent prevent said plaintiff from engaging in its said business, and will destroy said business in part, and will cause said plaintiff great and irreparable damage, which cannot be estimated and determined in an action at law. (10) Said defendant, James W. Raymond, treasurer as aforesaid, is furthermore financially irresponsible, and is not the owner of property and effects equal in value to the value of said engines or of said pretended tax and penalty, so that, if said engines are sold as aforesaid, said plaintiff will not be able to recover the value thereof from said defendant, and will not be able to collect any judgment therefor it may obtain against said defendant, and said defendant will be wholly unable to pay any such judgment; and if said plaintiff should pay said pretended taxes and penalty to said defendant, and should afterwards bring an action against said defendant to recover back the same, and should in any such action obtain a judgment against said defendant for the amount of said pretended tax and penalty, said defendant will be unable to pay such judgment by reason of said defendant's financial irresponsibility as aforesaid, and said plaintiff would not be able to collect the amount of such judgment, or satisfy the same by execution or otherwise; but, on the contrary, the amount of said pretended tax and penalty would be wholly and forever lost to said plaintiff. (11) That by reason of the premises said plaintiff has no adequate or complete remedy at law. Wherefore said plaintiff prays that said pretended tax and penalty, and the whole thereof, be adjudged null and void; and that said defendant, James W. Raymond, treasurer as aforesaid, his deputy and deputies, and his successor and successors in office, be perpetually restrained and enjoined from selling, or attempting to sell, said personal property, or any part thereof, to satisfy said pretended tax and penalty, or any portion thereof; that the said defendant and his deputy and deputies, and his successor and successors in office, be restrained and enjoined from selling, or attempting to sell, said property, or any part thereof, to satisfy said pretended tax and penalty, or any portion thereof, during the pendency of this suit; that said plaintiff have judgment against said defendant for the possession of said personal property, besides its costs and disbursements in this action; and that said plaintiff have such other and further relief as may be equitable and just in the premises."

Defendant demurred to this complaint as not stating facts sufficient to constitute a cause of action. The court overruled the demurrer, and, defendant having elected to stand by his demurrer,

judgment was rendered for plaintiff, granting a perpetual injunction as prayed for.

Defendant appeals.

Charles F. Templeton, Attorney General for appellant.

Ball, Wallin & Smith and *John C. Bullitt, Jr.* (*James McNaught* of counsel) for respondent.

FRANCIS, J.—The amended complaint, the allegations of which are admitted by the demurrer, and are on this appeal to be taken as true, discloses that the gross earnings of the respondent railroad company for the year 1886 (to which the amount in controversy relates) was \$2,654,756.31. That \$395,330.63 of this sum represented all the gross earnings of said respondent for said year 1886, in business originating and terminating within the Territory of Dakota, leaving the sum of \$2,259,425.68 as the total of its gross earnings for said year, from business, namely, the transportation of persons and property between points situated wholly without this Territory; or points without and points within this Territory; or points within and points without this Territory; and coming under the head of interstate commerce business. It is clear, at the outset, and conceded by the attorney general for the appellant, that so much of the act entitled "An act to provide for the levy and collection of taxes upon the property of railroad companies in this Territory," approved March 9, 1883 (Sess. Laws Dak. 1883, p. 211), as provides for a tax, or the payment of a per centum in lieu thereof, upon the gross earnings of a railroad company operating in this Territory, received for business,—the transportation of passengers and property,—not local, that is, not originating and ending wholly within this Territory, but interstate, and therefore coming under the head of interstate commerce, is unconstitutional and void. It is an intermeddling with, and an effort to tax, the earnings or proceeds arising from interstate commerce, and the attempted usurpation of a power which, under the constitution, is to be solely and exclusively exercised by congress. Among other cases, see *Fargo v. Michigan*, 121 U. S. 230-247; *Philadelphia and S. M. Steamship Co. v. Pennsylvania*, 122 U. S. 326-347, and cases cited in court opinion. Applying the principles asserted in these and other cases, and the controlling doctrine established by our country's most eminent tribunal, to the point now under review, it follows that the respondent railroad company in this case could neither be called upon nor compelled by the Territory of Dakota to pay any tax, nor any sum in lieu thereof, upon its earnings or receipts in its interstate commerce business represented for said year 1886 by said admitted sum of \$2,259,425.68. Such earnings are not within the taxing domain of the Territory. Holding this, we necessarily,

Taxation of
gross
receipts—
Interstate
commerce.

and in legal logic, reach the conclusion that the only portion of the gross earnings of the respondent for the year 1886 upon which, under said gross earnings law, the Territory could claim the per cent. in lieu of taxes, was said sum of \$395,330.63, the amount of its gross earnings for business beginning and ending in the Territory of Dakota, and which, for distinctness, we will term "local business" in this Territory, or business not interstate. Manifestly the gross earnings of respondent for this local business for said year 1886, as alleged in the amended complaint, did not exceed the sum of \$400,000, and, following the allegation of the complaint, and the course of counsel, for convenience, we take this sum as the amount upon which the said respondent railroad company was to pay for said year 1886 the per centum of 3 per cent. provided for in said gross earnings law, amounting to \$12,000. It must be noted that the validity or constitutionality of said gross earnings law, in its application to the gross earnings of the respondent, for what we have denominated its "local business" in this Territory, is not assailed in this appeal, and is therefore neither questioned nor passed upon by this court, which, for the purposes of this appeal, takes said act or law as it exists with respect to said local earnings; its legal force in this regard being entirely conceded by counsel for both appellant and respondent, and made the basis of their contention in this case.

The real question to be determined in deciding the case is this, namely: Was any sum due from the respondent railroad company to the Territorial treasurer, appellant,—that is, to the Territory,—under the said gross earnings law, for said year 1886, when the said property of the respondent was seized by the appellant. The appellant claims as due and unpaid the sum of \$6,000, being the one-half of the amount of 3 per cent. on the gross earnings of the respondent from its said local business in this Territory for said year 1886. The respondent asserts that nothing is due from it to the appellant on its said local gross earnings for said year, the whole of said 3 per cent., \$12,000, having been paid by it to the Territorial treasurer, the appellant, long prior to the seizure of its said property by appellant. By the terms of said gross earnings law the payment of the 3 per cent. is to be made, "one-half on or before the 15th day of February, and one-half on or before the 15th day of August in each year," the per cent. for 1886 being payable in 1887. It is alleged in said complaint, and admitted, that "on the 5th day of March, A.D. 1887, said plaintiff (respondent) duly paid to the defendant (appellant), treasurer as aforesaid, the sum of \$38,095.31 as and for taxes on its earnings under the terms and provisions of the act last mentioned" (said gross earnings law). The plaintiff (respondent) then paid to the defendant (appellant) on that date more than three times the

**Amount of
tax payable.**

amount due from it to said defendant, under said gross earnings law for said year 1886. The court is, however, asked by the attorney general, for the defendant, to hold that as only one-half of the 3 per cent. for said year 1886 was due and payable at the time said sum of \$38,095.31 was paid by the respondent to and received by the Territorial treasurer, defendant, said payment operated only as the discharge or satisfaction of said one-half (\$6,000) due on the 15th day of February, 1887, and that the remaining one-half of the 3 per cent. (another \$6,000) became due and payable August 15, 1887, and has not been paid. Such a holding would shock the conscience of equity, and is not demanded by the letter or spirit of said gross earnings law. The attorney general, for the defendant (appellant) contends that "the judgment of the court below, so far as it declares the amount due the Territory August 15, 1887, 'fully paid long prior to the seizure by the defendant of the personal property described in the complaint' is clearly erroneous. There is no allegation in the complaint that it has been paid, or any part thereof; therefore, the demurrer admits no such fact. True, there is an allegation in the complaint that plaintiff, on the 5th day of March, 1887, paid into the Territorial treasury \$38,095.31, but it is not alleged that it was made in payment of the amount due for any particular year, or part of a year, and the court cannot presume that it was intended to satisfy the tax which defendant is now seeking to collect." The attorney general, however, entirely saves us from the necessity of venturing upon any presumption, violent or otherwise, and plants us upon the solid footing of fact, when he immediately informs us in his brief that "in fact the amount paid by plaintiff March 5, 1887, was paid in satisfaction of the instalment which became due February 15, 1887, and was the exact amount of such instalment, as appeared by the voluntary statement made by the plaintiff." That the said payment of \$38,095.31, made by the respondent, March 5, 1887, related to the year 1886, is beyond question, and what we are to enquire and determine is this, namely: Did that payment discharge and satisfy only the installment of the 3 per cent. payable on or before February 15, 1887, and leave unpaid the remaining instalment, payable on or before August 15, 1887, or did said payment of \$38,095.31, (which it is conceded was more than three times the amount of the full 3 per cent. due for said year 1886,) operate as a discharge and satisfaction of the two instalments, or, in other words, the whole sum due for 1886? When a payment is required to be made on or before a fixed date, it may be made on said date or at any time prior thereto. A payment to be made on or before August 15th can assuredly be made in March prior thereto. The respondent could pay the 3 per cent. in two instalments, at the precise dates named in the act for that purpose, or, waving the full extent of

the limit, could avail itself of the effect of the words of limitation, and obey the law by making the payment of the whole amount for the year in one payment, or in two payments prior to the expiration of the last date fixed by the act; the evident purpose of the gross earnings law in this particular being to provide for the payment of the whole amount before the expiration of August 15th, and thus fix a time or limit within which the amount due for each year should be paid. The provision for payment in instalments is not so much for the benefit of the Territory as for the accommodation of the railroad company; and the party to whom, or for whose benefit, a right of privilege is given by statute, may waive or surrender that right or privilege in whole or in part if he does not thereby impair, injure or destroy the rights or benefits conferred upon, or flowing to, another, in or from said statute or other legal or equitable source. After an examination of the case before the court I am convinced that, without resort to presumption; or the violation of any legal principles, but, rather, as a plain extraction of fact from clearly perceptible evidence, and in accord with sound legal and equitable doctrine, we may conclude that the said payment of said sum of \$38,095.31 was in satisfaction and discharge of the full amount due from the respondent railroad company to the Territory under said gross earnings law for said year 1886. The amount, then, claimed by the Territory, and for the alleged nonpayment of which the defendant, treasurer of the Territory, seized the personal property of the plaintiff railroad company, had been paid prior to the date of said seizure, and before the expiration of the last date fixed or limited by the act for its payment, and at the time of said seizure, nothing was due from the respondent to the Territory under said gross earnings law for said year 1886. The demurrer was properly overruled, and the judgment for plaintiff (respondent) fully warranted by the allegations of the complaint admitted to be true by the demurrer.

The errors assigned having no substance, the judgment of the district court is affirmed. All the justices concurring.

Taxation of Gross Receipts.—See *Ratterman v. Western Union Tel. Co.*, 127 U. S. 411; s. c. 21 Am. & Eng. Corp. Cas. 1, note 10; *Delaware & H. R. R. Co. v. Com.*, *ante*, p. 359.

MARTIN COUNTY *v.* DRAKE.MURRAY COUNTY *v.* MINNESOTA LOAN AND INVESTMENT CO.*(Minnesota Supreme Court, January 30, 1889.)*

Taxation—Exemption—Railroad Lands.—The revenue laws of this State have fixed May 1st as the date for determining the taxability of property, and its ownership and value for purposes of taxation for the year. Hence lands of a railway company, which are exempt from taxation "until sold and conveyed," if conveyed before May 1st, are subject to taxation for the then current year. If not conveyed until after that date, they are not.

Certified cases from Martin and Murray Counties.

Daniel Rohrer, for Minnesota Land Investment Company and A. M. Drake, defendants.

T. J. Knox, F. S. Livermore, T. T. Smith and *Moses E. Clapp*, Attorney General, for Murray and Martin counties.

MITCHELL, J.—These proceedings to enforce payment of taxes on two tracts of land, one in Martin county, for the year 1885, and the other in Murray county, for 1886, are certified to this court pursuant to Gen. St. 1878, c. 11, § 80. Both tracts were a part of the land grant of the St. Paul & Sioux City Railway Company, whose charter, like those of all the old "land grant" companies, contains the familiar exemption or commutation clause to the effect that its "land grant" lands shall be exempt from all taxation until sold and conveyed by the company, and that the railroad and its appurtenances, and all the property of the company, shall be exempt from taxation in consideration of the payment to the State of a certain percentage of the yearly gross earnings of the road. The land in Martin county was sold and conveyed by the company to defendant Drake, April 15, 1885, and that in Murray county to defendant the Minnesota Loan and Investment Company, June 17, 1886. The questions are whether the former was subject to taxation for the year 1885, and the latter for the year 1886.

The substance of the defendant's contention is that inasmuch as the provisions of the railway company's charter referred to is not an exemption of its property from taxation, but merely a substituted method of taxing it, as this court has repeatedly held, therefore the payment of this percentage of the gross earnings of the road from January 1st to December 31st of any year is a full payment of all taxes for that year on all property which the company may own at any time during the same year; and hence to tax any of it *eo nomine*, for the same year, in the hands of the company's assignee or grantee, is a violation of the legis-

Statement of
case.

Exemption
of railroad
grant "un-
til sold or
conveyed."

lative contract with the company, and is also illegal, as being double taxation. We fail to see how this involves any violation of the contract of the State with the company. The exemption or immunity is personal to the company, and does not inhere in the property. What the State contracted was not to tax the land *in specie* while it belonged to the company, or, in the language of the charter, "until sold and conveyed." As soon as thus disposed of by the company, it becomes as fully subject to the legislative power of taxation as any other land in the State. The fallacy in defendant's argument is in the assumption that the payment by the company of this percentage on its gross earnings amounts to payment of the taxes upon all property which the company may have owned at any time during the year, regardless of its ownership at the particular date in the year fixed by law to determine its *status* for purposes of assessment and taxation. The percentage of gross earnings paid by the company is merely the equivalent of the tax it would have to pay had a tax *in specie* been assessed. In other words, it is a commuted payment of its own tax, and not that of somebody else.

This is equally an answer to the other objection, that it involves unequal or double taxation. Absolute equality in taxation is unattainable. It must happen under any tax law that some property will be taxed twice, while other property will escape altogether. Instances will occur where persons will have to pay tax on property which has ceased to exist. But no question of constitutional law is necessarily raised by such inequalities. They are unavoidable. All tax laws have to fix upon some particular date in the year at which to determine the taxability, as well as the ownership and value, of property, for purposes of assessment and taxation. Our revenue laws have fixed this at the 1st of May. Gen. St. 1878, c. 11, §§ 6, 24, 105. Personal property is assessed and taxed with regard to both its value and ownership at that date. Real estate is assessed according to its value at that date, and the State has a lien for the tax from date. Every man must pay taxes on what he then owns, and at its then value, no matter how short a time he may have owned it, or how soon thereafter it is lost. All property, if in being as taxable property at that date, is liable to taxation for that year at its then value, although it may only have come into being the day before, and may be in whole or in part destroyed the day after. Under this system, defendant Drake may have to pay for the year 1885 as much tax on land which was only subject to taxation *in specie* from and after April 15th as his neighbor will on land that was liable to such taxation the whole year, but, as already remarked, this is one of the inequalities that are unavoidable. It results in no double taxation against him. He has to pay no tax on the money or other con-

sideration which he paid for the land, as he would have had to do had he retained it until May 1st. If defendants' contention is sound, it necessarily and logically leads to absurd results. Suppose on January 1st the railway company should sell to A. some of its personal property for \$1,000 cash. A. would not have to pay any tax for that year on the \$1,000, because he had parted with it before May 1st, and, according to defendants' theory, he could not be taxed on the personal property, because the 3 per cent. of its gross earnings paid by the company paid all taxes on it for that year. Any logic that leads to such results must be unsound.

We are referred to the provisions of Gen. St. 1878, c. 11, § 118 (as amended in 1881), requiring the State auditor, on or before April 1st in each year, to obtain lists of all government and railroad lands becoming taxable, and on or before April 15th to certify the same for taxation to the county auditor; also to section 141 of the same chapter, requiring the land-grant railroad companies, on or before April 1st in each year, to return to the railroad commissioner a full list of all lands sold, or contracted to be sold during the year ending the last of the preceding December. It is claimed that this shows a clear legislative intention that lands sold and conveyed by a railroad company during any year shall only be listed for taxation the next ensuing year, and then only upon the certificate of the State auditor. The statute does not say so. It is a mere matter of argument or inference, which has no weight, as against the express and fixed policy of our revenue laws, making May 1st the date for determining the ownership and value of property for purposes of taxation. The failure of the railroad companies to return these lists, or of the State auditor to certify them, or the mistakes of either in doing so, cannot affect the taxability of the land. The lists of lands sold or contracted, required to be furnished by the companies, may be designed to aid the State auditor in making his lists for the county auditors, but he is not confined to that source of information; and the lists certified by the State auditor to the county auditors are doubtless intended to aid the latter in making up the assessment rolls, but neither of these lists have an effect in determining the taxability of property. We are referred to the case of *Hennepin Co. v. St. Paul, M. & M. R. Co.*, 33 Minn. 534, in which it was held that lands purchased by the defendant company in July were not subject to taxation *in specie* for that year. We shall neither review nor reconsider the correctness of that decision, but merely suggest that it furnishes no aid to the defendant here. Our conclusion, therefore, is that the land in Martin county, having been sold and conveyed prior to May 1st, was subject to taxation for the then current year of 1885. The same line of reasoning that

Listing rail-
road lands
for taxation.

has led us to this result leads, in our judgment, necessarily and logically, to the conclusion that the land in Murray county, not having been sold and conveyed until after May 1, 1886, was not taxable *in specie* for that year. On the 1st of May, the time at which the value of land for the purpose of taxation, and by clear implication, at least, its taxability, is fixed by statute, this land was entirely exempt from such taxation. It was, for any such purpose, as if not then in existence. See *Long v. Culp*, 14 Kan. 412. The confusion that would follow, and the inequality of taxation, often amounting to double taxation, that would result, from any other construction of the statute, is a strong argument against its adoption. Land conveyed after May 1st, if taxed for that year, would, under the statute, have to be assessed, if at all, at its value, not at the time the purchaser bought it, but on May 1st, while still the property of the railroad company and hence exempt; and, if land conveyed in June might be taxed for that year, so might land conveyed in December. To do so would, in our judgment, be utterly inconsistent with the clearly expressed meaning and policy of the tax law.

The result is that the judgment of the court below in each of these proceedings is affirmed.

Exemption from Taxation—Constitutionality.—The exemption from taxation contained in the Arkansas Act of 1869 (Mansf. Dig. § 5489, 5490), which provides that when lands have been sold to the State for taxes, the owner may donate the same in aid of the construction of a railroad, and thereupon the auditor shall issue a certificate for the lands to the railroad, and lands so donated "shall not be listed nor subject to taxation until conveyed to the actual purchasers" by the company, is invalid, being a contravention of the provision of the Arkansas constitution, which declares void all laws exempting property from taxation. *Files v. State* (Ark.), 3 S. W. Rep. 817.

Under the provision of the Arkansas Act of 1881, for the enforcement of payment of overdue taxes, that lands sold under it shall be redeemable only upon the payment of the amount due the State, a railroad company is not entitled to demand a certificate by the auditor for lands sold under that act, which have been donated by the owner in aid of its construction. *Files v. State* (Ark.), 3 S. W. Rep. 817.

Exemption of Lands Until Sold or Conveyed.—See note, 33 Am. & Eng. R. R. Cas. 475.

YAZOO AND MISSISSIPPI VALLEY R. CO.

v.

THOMAS, *Sheriff, et al.*

(*Mississippi Supreme Court, November 12 1888.*)

Taxation—Exemption—Construction.—The provisions of the charter of the Yazoo & Mississippi Valley Railroad Company, that the company's property

shall be exempt from taxation for a term of twenty years from the completion of said railroad to the Mississippi River, but not to extend beyond twenty-five years "from the date of the approval of this act," takes effect only upon the completion of the railroad to the Mississippi River, and so long as it remains uncompleted it is subject to taxes imposed by a later statute.

APPEAL from Chancery Court, Hinds County.

In the charter of the Yazoo & Mississippi Valley Railroad, granted in 1882, it was provided that "said company, its stock, its railroads and appurtenances, and all its property in this State, necessary or incident to the full exercise of all the powers herein granted—not to include compresses and oil mills—shall be exempt from taxation for a term of twenty years from the completion of said railroad to the Mississippi River, but not to extend beyond twenty-five years from the date of the approval of this act, and when the period of exemption herein prescribed shall have expired, the property of said railroad shall be taxed at the same rate as other property in this State." At the time the present suit was brought, the railroad had not been completed, although the company was operating the part which was in running order. In 1888 an act was passed which provided that all railways which hitherto had escaped taxation should now be subject to it. The authorities of the different counties through which the railroad ran thereupon proceeded to enforce the payment of the taxes assessed, and the railroad company filed a bill to enjoin the collection of the same.

The court having sustained the defendant's demurrer to the bill, and entered a decree for the amount of the taxes, the complainant appealed.

W. P. & J. B. Harris and *C. V. Gwin* for appellant.

T. M. Miller, Attorney General, *Calhoon & Green*, *Hooker & Wilson*, *Rush & Gardner* and *Nugent & McWillie* for appellees.

ARNOLD, C. J.—Statutes exempting persons or property from taxation, being in derogation of the sovereign authority and of common right, are, according to all the authorities, strictly construed. As taxation is the rule, and exemption the exception, the intention to create an exemption must be expressed in clear and unambiguous terms; and it cannot be taken to have been intended when the language of the statute on which it depends is doubtful or uncertain. Legislation, which relieves any species of property from its due proportion of the burdens of government, must be so clear that there can be neither reasonable doubt nor controversy in regard to its meaning. *Cooley*, Tax'n (2d Ed.) 204; *Bailey v. Magwire*, 22 Wall. 215; *Vicksburg, S. & P. R. Co. v. Dennis*, 116 U. S. 665; 24 Am. & Eng. R. R. Cas. 500; *Frantz v. Dobson*, 64 Miss. 631.

Statement
of case.

Construction
of
exemption
"from the
completion"
of rail-
road.

In the light of these principles, we are unable to find anything in the charter of appellant to warrant the exemption claimed in this case. It is quite plain to us that the exemption created by section 8 of appellant's charter (Acts 1882, p. 847) was intended to commence from and after the completion of a railroad to the Mississippi river, and was to continue thereafter for 20 years, if the road was completed to the river in 5 years from the date of the approval of the act, but liable to be diminished by whatever time beyond 5 years was consumed in the completion of the road to the river. At the time appellant's charter was enacted railroads in process of construction were not taxable under the general laws of the State (Code, § 608), and this may account for the charter providing exemption from taxation after the completion of the road, and none during the period of its construction.

Affirmed.

Exemption from Taxation—Construction.—In *Yazoo & Mississippi Valley R. Co. v. Board of Levee Comrs.*, 37 Fed. Rep. 24, the effect of this clause of the charter was again under consideration and the court in that case held that the exemption did not take effect until the completion of the road to the river. HILL, J., before whom the action was tried, said:

"The most difficult point to be determined is as to the period of time at which the exemption commences, whether at the passage of the act or only from the time of the completion of the railroad or one of its branches to the Mississippi river. The act provides that the twenty years' exemption shall extend for twenty years from the completion of the railroad to the Mississippi river, but not to extend beyond twenty-five years from the date of the approval of this act, after which time the property of the said railroad might be taxed at the same rate as other property in this State. It will be observed that the eighth section of the act under which the exemption is given fixes no point on the Mississippi river. The second section of the act provides that one of the lines, or a branch therefrom, shall reach the Mississippi river at or near a point opposite Arkansas City, if practicable, but this provision relates only to the practicability of reaching the Mississippi river at or nearly opposite Arkansas City. The completion of the railroad to any point on this river will entitle the complainant corporation to the exemption provided, but it must be completed to some point on this river to entitle it to the twenty years' exemption. When that is done, the exemption will extend to all the railroads, and property connected with it, used in their construction and operation under the charter, including its stock. It is argued by the learned counsel for the complainant, with great earnestness and plausibility, that the provision in the act that, after the exemption expires, the property may be taxed at the same rate imposed on other property in the State, is the exclusion of any taxation until that time, and that the exemption commenced with the approval of the act, not to extend beyond twenty-five years, and not longer than twenty years from the completion of the railroad to the Mississippi river. The only decision of the supreme court of the United States on this point to which I have been referred is the case of *Vicksburg, S. & P. R. Co. v. Dennis*, 116 U. S. 665; 24 Am. & Eng. R. R. Cas. 500. In that case the exemption was for ten years after the completion of the railroad within the State. Five of the judges held that the exemption commenced only from the completion of the road, while four of them held that it commenced from the passage of the act of incorporation. While this division in opinion would certainly very much weaken the force of a decision, if merely persuasive upon this court, yet, it being the judgment of the supreme court, it would not be safe to depart from it by a court bound by its decisions, as is this court. The learned counsel for the complainant argue that this case is not applicable to the case under consideration, and to sustain this posi-

tion endeavor in this case to draw a distinction between the words "for ten years after" the completion of the road, and "twenty years from" the completion of the road. Though the distinction asked to be drawn is plausible, I am unable to adopt it. Had the language been "until twenty years after the road shall be completed to the Mississippi river, but not to continue more than twenty-five years after the approval of this act," there would have been no doubt about the exemption beginning with the approval of the act. It was doubtless understood, both by the legislature and the incorporators, that the road would be built to the Mississippi river as soon as practicable, and, if it was so built, that during its construction it and the property connected with it would have been exempt from taxation under the provision of section 608, Code 1880, which applies to all railroads during their construction. So I conclude that the exemption under the charter will not commence until the completion of the road to the Mississippi river, but that any portion of it not completed and not operated for profit is exempt under the provisions of the Code of 1880. It is pressed in argument by complainant's counsel that, if this be held to apply to this road, that it deprives it of the exemption granted other railroad companies by the same legislature, which gave twenty years' exemption from the passage of the acts chartering them. The answer to this argument is that it was not so provided in the charter, and that the failure to obtain the exemption provided for has arisen from the failure of the complainant to comply with its part of the contract in building the road to the Mississippi river, and hereby securing to the state and the public to be benefitted the benefits constituting the consideration for the exemption. If the purpose is still to carry out the enterprise as was contemplated when the charter was granted, the exemption can be obtained in a reasonably short time by continuing the road to the Mississippi river, which, during its construction, will be exempt from taxation under the provisions of the Code. But the exemption provided in the charter did extend the exemption for all the time necessary in the construction of the railroad or roads over and above that given the other roads or companies, as the exemption provided for them included the time of construction."

It was urged that the exemption contained in the charter was invalid under the provision of sections 13 and 20 of Art. 12 of the Mississippi Constitution, but the court held that the provision of section 13 that "the property of all corporations for pecuniary profits shall be subject to taxation the same as that of individuals" was intended only to apply to private corporations and not to those which were *quasi* public in their nature. It was also held that the exemption having been granted was irrevocable in its nature under the provision of the federal constitution, that no State shall pass any law impairing the obligation of contracts.

Extension—Exemption from Taxation—Construction.—The exemption from taxation of certain lands belonging to a railroad company expired on January 1, 1866, and in 1877 a statute was passed which provided that "the time fixed during which the lands granted to said companies by said acts are exempted, is hereby extended to three years." *Held*, that the expiration commenced to run from the termination of the original exemption and not from the passage of the act in 1877. *Wisconsin Cent. R. Co. v. Comstock* (Wis.), 36 N. W. Rep. 843.

ILLINOIS CENTRAL R. CO.

v.

CITY OF DECATUR.

(*Illinois Supreme Court, September 27, 1888.*)

Taxation—Special Tax—Exemption.—A special "tax" levied upon property for a local improvement by virtue of an authority derived from a constitutional

provision that the legislature may vest municipal corporations with power to make local improvements "by special taxation of contiguous property," is not within the meaning of a provision in the charter of a railroad company by which its property "is exempt from all taxation of every kind except as herein provided."

APPEAL by the Illinois Central R. Co. from an order of Macon county court, confirming an assessment upon property of the railroad company for the purpose of paving a street. It is provided by section 9 of Art. 9 of the Illinois constitution of 1870 that "The general assembly may vest the corporate authorities of cities, towns and villages with power to make local improvements by a special assessment, or by special taxation of contiguous property or otherwise."

Outten & Vail for appellant.

I. R. Mills for appellee.

MAGRUDER, J.—This is an appeal from a judgment of the county court of Macon county, confirming a special tax assessed by three commissioners for the purpose of paving East Wood street, in the city of Decatur, and charged against a portion of the right of way of the Illinois Central Railroad abutting

Facts. upon said street, and contiguous thereto. Upon the return of the assessment roll appellant appeared in the county court, and filed objections, which were overruled. The city council of Decatur, on June 8, 1887, passed an ordinance for the paving of said street, which was declared to be a local improvement, and therein provided that the cost of paving the street and alley intersections and crossings should be paid out of the general taxes, and that the remainder of the cost of said improvement should be paid for by special taxation upon the lots, parts of lots, and parcels of land abutting upon said street, on both sides thereof, along the line of the improvement, in proportion to the frontage thereof upon the street. A committee of three persons was appointed by the ordinance to make an estimate of the cost of the improvement, and report the same to the council. On June 20, 1887, the committee made a report of the estimate of the cost of the improvement, exclusive of the cost of street and alley intersections and crossings, and also showing the cost of such street and alley intersections and crossings, which report was approved by the council on the same day. A petition was then filed in the county court, containing copies of the ordinance and of the report, and praying that commissioners be appointed, and that the cost of the improvement be levied and assessed, as provided in the ordinance, and as required by the law in such cases. The court, upon an examination of the petition, ordinance, and report, appointed three commissioners to make the levy and assessment for the improvement in the manner prescribed by the ordinance and by the

law in such cases, and to make report as required by law. The commissioners so appointed to make the special tax levy reported to the court a special tax-roll, certifying to its correctness, and giving therein the names of the owners, the description of the lots or parcels of land abutting on the line of the improvement, the number of feet'frontage thereof, and the amount of special tax levied against each of such lots or parcels of land. Due notice was given that the city council had applied to the county court for the levy and assessment of the cost of said improvement, except street and alley intersections and crossings, upon the abutting property, according to frontage; and that there would be a hearing of the assessment made and returned to court at the February term, 1888. Upon the hearing the objections to the assessment roll returned to the court were overruled, and the assessment as made and returned was confirmed.

The main objection made by the appellant company is that, by the terms of its charter, its property is exempt from the special tax thus imposed. By section 22 of the act incorporating the Illinois Central Railroad Company, approved February 10, 1851, it is provided that "the said corporation is hereby exempted from all taxation of every kind, except as herein provided for," etc. Sess. Laws 1851, p. 71; Hurd, Rev. St. 1885, p. 1043, or sections 305, 306, of revenue act. It has many times been held by this court "that exemption from taxation does not exempt from special assessments." *County of McLean v. City of Bloomington*, 106 Ill. 209, and cases there cited. Therefore, if the improvement in the present case had been made by special assessment, appellant's property would not be relieved by the exemption of its charter from its just proportion of the burden of such assessment. Is there any such difference between "special assessment" and "special taxation" of contiguous property, as those terms are used in section 9 of article 9 of our constitution, that the general word "taxation" should be held to include the latter, and not the former? It is the settled doctrine of this court that special assessments are not included within the meaning of the word "taxation." The question presented for our consideration is whether the same doctrine should also be applied to special taxation of contiguous property. The thirteenth section of the act by which the canal lands were granted to the trustees of the Illinois and Michigan canal contains the following provision: "The said lands and lots shall be exempt from taxation of every description, by and under the laws of this State, until after the same shall have been sold and conveyed by the said trustees as aforesaid." In *Trustees v. City of Chicago*, 12 Ill. 403, the question was whether land belonging to the canal trustees was exempt under this thirteenth section from an assessment for

**Exemption
from taxa-
tion does not
exempt from
special as-
sessments.**

opening a street in the city of Chicago, and we there said: "In our opinion the exemption must be held to apply only to taxes levied for State, county and municipal purposes. A tax is imposed for some general or public object. It is an exaction made for the purpose of carrying on the government. . . . It is a charge on the estate that lessens its value. In the proportion in which the owner is required to pay is his pecuniary ability diminished. This is the sense in which the term 'taxation' is used and understood. . . . The assessment in question has none of the distinctive features of a tax. It is imposed for a special purpose, and not for a general or public object. It is not a charge on the estate which reduces it in value. It subtracts nothing from the means or resources of the canal. The improvement is made for the convenience of a particular district, and the property there situated is required to bear the expense in the proportion in which it is benefited." So in *Mix v. Ross*, 57 Ill. 121, it is said; "There is a plain distinction between taxes, which are burdens or charges imposed upon persons or property to raise money for public purposes, and assessments for city or village improvements, which are not regarded as burdens, but as an equivalent or compensation for the enhanced value which the property of the person assessed has derived from the improvement."

An application of these definitions to the case in hand will show that "special taxation of contiguous property," as provided for in the constitution, is not embraced within the meaning of an ordinary tax. "Special assessment" and "special taxation of contiguous property" are both designated in the constitution as modes or methods by which "local improvements" are to be made. An improvement that is local is for the benefit of a particular locality, or "for the convenience of a particular district." Hence a special tax on contiguous property for the purpose of making a local improvement is not "imposed for a general or public object." As the amount of such special tax is equal to the cost of the improvement to be made, the money raised thereby is spent in paying for the improvement, and, consequently, it cannot be said that it is exacted "for the purpose of carrying on the government." It is raised for a special purpose. Such a special tax of contiguous property cannot be regarded as a "burden or charge imposed upon . . . property to raise money for public purposes," except that the public may indirectly be benefited by the use of a local improvement. Moreover, a local improvement necessarily and from its very nature makes better and benefits the locality where it is made. Consequently the contiguous property, which is specially taxed for the purpose of making such improvement, receives an increase in its value, and its owner finds in such enhanced value an equivalent or compensation for the money paid

in discharge of the special tax. Nothing is subtracted from his means or resources. It is true that there are recognized differences between a special assessment and special taxation of contiguous property, but these differences consist chiefly in the modes of procedure in the two cases, and the extent and amount of benefits received from the improvement by the property assessed or specially taxed. Both are based upon a supposed benefit to the property charged. In *White v. People*, 94 Ill. 607, it was said: "Whether or not the special tax exceeds the actual benefit to the lot is not material. It may be supposed to be based on a presumed equivalent. The city council have determined the frontage to be the proper measure of probable benefits. That is generally considered as a very reasonable measure of benefits in the case of such an improvement," etc. In *Craw v. Village of Tolono*, 96 Ill. 255, it is said: "Special taxation, as spoken of in our constitution, is based upon the supposed benefit to the contiguous property, and differs from special assessments only in the mode of ascertaining the benefits. In the case of special taxation, the imposition of the tax by the corporate authorities is of itself a determination that the benefits to the contiguous property will be as great as the burden of the expense of the improvement," etc. The two cases last referred to are quoted and approved of in *Enos v. City of Springfield*, 113 Ill. 65. In *City of Sterling v. Galt*, 117 Ill. 11, it is said that special assessment differs from special taxation mainly in this: that the assessment cannot exceed the benefits the property will derive from the improvement, and the owner of the property assessed has the right to have this question passed upon by a jury, etc.; whereas, in cases of special taxation, the jury have nothing to do with the amount, which is by ordinance assessed upon contiguous property. But it is also there held that, in case of special taxation, the whole of the burden is permitted to be imposed upon the contiguous property, upon the hypothesis that the benefits will be equal to the burden cast upon the property. From this review it appears that a more certain and exact equality between the benefits received and the burden imposed must be found to exist in the case of special assessment than in the case of special taxation, and that the mode of procedure in the former is better adapted for accurately ascertaining the benefits than the method pursued in the latter. Nevertheless, in special taxation, as well as in special assessment, the property charged is supposed to receive such benefits from the improvement as will be an equivalent for the amount of the special tax. As has already been shown, a special assessment is not embraced within the meaning of the word "taxation," because the owner of the property assessed gets back the amount of his assessment in the benefits received by his property, and therefore does not bear the burden of a tax. For the same reason, special

taxation of contiguous property cannot be included within the meaning of the general word "taxation," because the owner is compensated for the amount of the tax by the enhanced value of his property, and is not subjected to the burden implied in ordinary taxation. There certainly would be no justice in compelling the other property owners to bear the whole expense of an improvement, which confers as great an increase of value proportionally upon appellant's property as upon theirs. We are therefore of the opinion that appellant's right of way was not exempt by reason of the provision in its charter from the special tax assessed against it. We see no force in the objections made to the descriptions of the right of way abutting upon the north side of East Wood street and of that abutting upon the south side thereof. The descriptions designate the whole of the triangular piece south of the street, and describes a piece north thereof that has never been divided. The frontage on the street of the one is $17\frac{1}{4}$ feet, and of the other $55\frac{1}{2}$ feet. The appellant cannot complain that the description is not broad enough to take in all of the north piece, as this error, if it is an error, inures to appellant's benefit.

The judgment of the county court is affirmed.

Exemption from Taxation—Special Assessments. See note, 13 Am. & Eng. R. R. Cas. 418.

LOUISVILLE & NASHVILLE R. CO. v. HOPKINS COUNTY (2 Cases).

SAME v. CHRISTIAN COUNTY (2 Cases).

(*Kentucky Court of Appeals, October 20, 1888.*)

Taxation—Subscription in Aid—Sale of Road.—A railroad company which has purchased a completed road is only liable to taxation to pay the subscription of stock made by a county in aid of its construction, upon any additions to, or improvements made by it upon, the property purchased.

Same—Action to Recover Back—Involuntary Payment.—In Kentucky the collection of a tax against a railroad company must be enforced by judicial proceedings, and railroad companies therefore are not within the rule adopted by the Kentucky courts that, as a tax payer must submit to the levy and sale of his property for delinquent taxes, or pay the amount assessed, by so paying he makes an involuntary payment, which he can recover back in a suit against the county.

Same—Action to Enforce Payment—Interest.—In an action by a county to recover unpaid taxes, interest thereon is not allowable by way of damages.

APPEALS from circuit courts of Hopkins and Christian counties.

The opinion states the circumstances out of which the action arose.

John Feland for appellant.

Landes & Clarke for appellees.

LEWIS, C. J.—As these four cases require the same recital of facts, and directly or incidentally involve the same questions of law, counsel have agreed they be heard and decided together. In 1851 a corporation, "The Henderson & Nashville Railroad Company," was chartered to construct a railroad from Henderson, Ky., to Nashville, Tenn., but after securing the right of way, and grading a portion of it (how much does not appear) the work was abandoned on account of the late war. In 1867 a company, "The Evansville, Henderson & Nashville Railway Company," was incorporated, and by purchase became the owner of the property and franchises of the first named; and with the proceeds of bonds issued by the city of Evansville and the counties in Kentucky through which the road extends, including Christian and Hopkins, in payment of stock subscribed by them to the capital stock of that company, amounting to about \$1,000,000, and the proceeds of a bond of the company for the same amount, secured by mortgage on that portion of it in this State, the road was completed and put in operation. But in 1879, under a decree rendered in the district court of the United States, all that part of the road that had been mortgaged, certain real estate and rolling stock, together with the chartered rights and franchises of the company, were sold and purchased by the Louisville & Nashville Railroad Company, which has owned and operated the road ever since. The first of these actions in order was instituted by the county of Hopkins against the Louisville & Nashville Railroad Company, to recover a balance unpaid of taxes alleged to be due by the defendant on its property situated in that county under a levy made by the county court for the year 1872, to pay interest on the bonds issued in payment of the county's subscription to the capital stock of the Evansville, Henderson & Nashville Railroad Company, before mentioned, and taxes alleged to be wholly due and unpaid under levies for the same purpose for each of the years 1883-4-5. The second was instituted by the county of Christian to recover of the same defendant on unpaid balance of taxes for the year 1882, and the amount for each of the years 1883-4-5, alleged to be due under levies made to pay the interest and principal of bonds that county issued to pay its subscription to the capital stock of the same company. The third, an action in equity, was instituted by the Louisville & Nashville Railroad Company against the county of Christian, to recover back the several amounts of such taxes collected under levies for the years 1879-80-81, in part for the year 1882, which the plaintiff alleges were paid by it in ignorance of the law and facts, and of its rights, when it did not owe any part

Statement
of cases.

thereof. The fourth, also an action in equity, was instituted by the Louisville & Nashville Railroad Company against the county of Hopkins, to recover back the several amounts of such taxes collected by that county for the same years, and likewise alleged to have been paid by the plaintiff in ignorance of the law and facts, and of its rights, no part of which it owed. In the first and second of these two actions, the entire property of the defendant being 31 4-5 miles of road, including land, improvements and equipments in the county of Christian, and 27.72 miles of road, land, improvements, and equipments in the county of Hopkins, were adjudged by the lower court liable for taxes levied to pay the said bonded indebtedness of the two counties, respectively, as well as for those levied to pay the ordinary county expenses, which were also sued for in each case, but not now disputed by the defendant; and judgments were accordingly rendered in favor of each plaintiff for the amounts severally claimed by them. In the third and fourth actions judgment was rendered in favor of each of the defendants, and the actions were as to each dismissed. From all the judgments the Louisville & Nashville Railroad Company has appealed, and in the first and second cases appellees have been granted cross appeals. There is no controversy about the assessment of the property in the two counties, as they were made by the county courts according to the rate fixed by the state board of equalization for the entire road within the State.

Whether railroad property situated in a county is liable to taxation to pay the subscription of stock made by such county towards constructing the road is a question which was first presented to and decided by this court in *Applegate v. Ernst*, 3 Bush 648. It was then held not be liable, the following language being used: "If liable for any portion of that subscription, it would to that extent pay the debt of the stockholders, or remit so much of the amount subscribed to itself, and consequently would get that much less than the subscription to it, or for its use. . . . To tax the road itself for that selfish purpose would be repudiation to the extent of the tax."

The rule there laid down does not, however, absolutely and fully apply where the road has been purchased by and becomes the property of a new company to which the county does not sustain the relation of stockholder or joint owner. *Clark County Court v. Elizabethtown, L. & B. S. R. Co.*, decided by this court April, 1886 (MS. opinion), was a case where the county of Clark had subscribed to the capital stock of the Lexington & Big Sandy Railroad Company, which, after constructing a portion of its road, became insolvent; and its franchise and property, in an unfinished state, were purchased by the Elizabethtown, Lexington

**Taxation of
railroad
property to
pay sub-
scription to
stock.**

**Modifica-
tion of rule
where
property
sold.**

& Big Sandy Railroad Company, and the right of the county to tax that part of the road and its appendages situated therein, to aid in paying the subscription of stock, was the question involved. And in the opinion this language was used: "If the payment of the debt entitled it (Clark county) to stock in the new company, there might be some reason for adjudging that it would be unjust to the other stockholders and to the corporation to tax the property of the corporation to pay an indebtedness that entitled the county to stock in the corporation. Such, however, is not the case. The Elizabethtown, Lexington & Big Sandy Railroad Company, when it purchased the old company, or rather its rights and franchises, became the owner of the roadbed and the entire property of the old company within the county; and the completion of the road, with all its valuable appendages, is not the property of the old, but of the new, company; and therefore the property of the appellee within the county is liable for its part of the burden of this tax, except so much of the property as was acquired by the purchase. This ought not to be taxed to pay a subscription that was made to construct it, and in imposing the taxation its value should be deducted from the value of the railroad property of the appellee within the county as it now exists." In that case the road was in an unfinished state when it passed from the old to the new company; in this, the road had been completed, and was in operation, when the new company became the owner. But the same principle applies whenever the new company has made an addition or accession to the property purchased, whether consisting in completing an unfinished road or increasing the capacity for business and advantages, and consequently the actual value, of one already completed. What the new company purchases in such case is exempt, because the subscription was made to construct it, and the county, as a stockholder, had an interest in it; but what may be afterwards added or annexed is not, nor ought to be, exempt, because the county neither contributed to nor has any interest in it. Consequently, to the extent that the railroad property between Henderson and the State line has, since it was purchased by the Louisville & Nashville Company, been increased in value by the addition or renovation of cross ties, rails, station houses, switches, rolling stock, and other appendages, and by having been made part of a system, doing increased business, instead of an isolated road, as was the case when purchased, it is liable to taxation in any county where it may be situated, as other property therein. And in imposing the taxation in these cases the lower court ought to have deducted the value of the railroad property in Christian and Hopkins counties at the time it was purchased from the value as it now exists.

Same principle applies whether road completed or unfinished at time of sale.

2. In *Underwood v. Brockman*, 4 Dana 309, it was held that "when it can be made perfectly evident that the only consideration of a contract was a mistake as to the legal rights or obligations of the parties and when there has been no fair compromise of *bona fide* and doubtful claims, we do not doubt that the agreement might be voided on the ground of a clear mistake of law, and a total want, therefore, of consideration and mutuality."

Taxes voluntarily paid cannot be recovered back. In the case of *Ray v. Bank*, 3 B. Mon. 510, the court, referring to the case just cited, and reviewing all the authorities on the subject, approved of the ruling in that case; but we think stated the doctrine fully and more accurately thus: "Upon the whole, we would remark that whenever, by a clear and palpable mistake of law or fact, essentially bearing upon and affecting the contract, money has been paid without cause or consideration, which in law, honor or conscience was not due and payable, and which in honor or good conscience ought not to be retained, it was and ought to be recovered back." In each of these cases the controversy was between individuals; but the case of *City of Louisville v. Anderson*, 79 Ky. 334, involved the question of recovery back of taxes paid in ignorance of the law, and of the rights of the person paying, and which there was no legal authority to collect. The property assessed in that case was farming lands, which had been unconstitutionally included in the city boundary, and this court affirmed the judgment of the lower court in favor of the plaintiffs. This court, in the opinion then delivered, assented to the general rule that taxes voluntarily paid cannot be recovered back, whether legally laid or not, as stated in *Cooley, Tax'n*, 567, in accordance with the current of authorities on the subject; but dissented from the proposition that all payments of taxes are supposed to be voluntary, and recognized the distinction between those cases where there is an apparent means of enforcing the illegal demand and where it cannot be done without a resort to judicial proceedings.

In all cases wherein it has been decided by this court taxes illegally paid might be recovered back, including *Fecheimer v. City of Louisville*, 2 S. W. Rep. 65, referred to by counsel, **What payments are to be deemed involuntary.** the payments were regarded as involuntary, because the tax collector had authority to levy and sell on the refusal to pay. As said by this court: "The process is summary, and in the hands of the party making the demand, and the tax payer must submit to the levy or pay the money." *City of Louisville v. Anderson*, 79 Ky. 334. The only exception under the statutes of this State exists in respect to railroad corporations, whose property, from considerations of public convenience and necessity, cannot be levied on and sold to pay taxes, and the collection must be enforced by judicial proceedings. The payment by the Louisville & Nashville Rail-

road Company of the taxes which it now seeks to recover back from the counties of Christian and Hopkins was made voluntarily, and in no sense under compulsion; and, such being the case, we perceive no reason to make in these cases an exception to the general rule laid down in *City of Louisville v. Anderson*, that a party paying taxes, who is entitled to a day in court, and can litigate the demand about to be enforced against him, but instead of doing so voluntarily pays it, is without remedy. Moreover, a portion of the property situated in the two counties was at the time of payment of the taxes legally liable to taxation, not only for general county purposes, but for the purpose of paying off the county subscription; and therefore, as such payment was not wholly without consideration, the cases do not come within the rule laid down in the cases heretofore decided by this court. Nor do either of them belong to that class of cases where honor or good conscience requires the taxes to be refunded.

3. It is well settled that interest is not allowable upon taxes by way of damages (*Ormsby v. Louisville*, 79 Ky. 202); and consequently the court did not err in refusing to allow it upon the amounts adjudged in favor of the two counties. Wherefore the judgments rendered in actions 1 and 2, in favor of the counties of Christian and Hopkins, are, for the reasons indicated, reversed, and remanded for further proceeding consistent with this opinion, and affirmed on the cross appeals; and the judgments in the third and fourth actions are affirmed.

Interest on
taxes not
allowable
by way of
damages.

Taxation—Subscription in Aid—Sale of Road.—The purchaser of an uncompleted railroad belonging to a company, to the stock of which a county has subscribed in aid of the construction, is not liable to taxation upon the value of the property acquired by the purchase and the amount expended by the old company is not the criterion of the value of the road at the time of the purchase. The difference in the cost of constructing the road, the washing away of embankments by freshets, rains, etc., the decay of trestles, the decay of abutments to the bridges, etc., must be considered in estimating the reasonable value of the road at the time of the sale. *Owensboro & N. R. Co. v. Logan County* (Ky.), 11 S. W. Rep. 76.

Same—Constitutional Law—Title of Act.—An act, the title of which is in the following terms, "An act to empower Logan county to refund the bonded indebtedness of the county at or before maturity, to create a sinking fund for that purpose, to provide for commissioners of the sinking fund and collection of the taxes levied, and to prescribe the duties and power of said officers," relates to only one subject, viz: the payment of the amount of the bonded indebtedness and is not unconstitutional. *Owensboro & N. R. Co. v. Logan County* (Ky.), 11 S. W. Rep. 76.

Same—Municipal Aid—Mandamus.—It is said by the United States Circuit Court for the Eastern District of Missouri in the case of the *United States ex rel. Jones v. Macon County*, 35 Fed. Rep. 483, that though a judgment has been obtained on coupons of county bonds issued under section 13 of the Missouri act of February 20, 1865, incorporating the Missouri & Mississippi Railroad, which provided that the amount of the special tax to be levied in any one year for their payment should not exceed one-twentieth of one per cent., *mandamus* will not lie to compel the levy of a higher special tax to pay such judgment, as the hold-

ers of such bonds are chargeable with notice of the provisions of the statute under which they are issued.

STATE *ex rel.* TILLERY, Collector,

v.

HANNIBAL AND ST. JOSEPH R. CO.

(*Missouri Supreme Court, February 4, 1889.*)

Taxation—Bridge—Assessment—Toll Bridge.—A bridge constructed by a railroad company across a river and forming a part of the railroad is assessable under a statute which provides for the taxation of the property of railroad companies including the road and rolling stock as a whole, and not under a statute which provides for the assessment of bridges for crossing which a toll is charged, notwithstanding the fact that such bridge is also used for the passage of carriers and foot passengers for which the company charges tolls.

Same—Bridge Act—Carriages—Foot Passengers.—The Missouri bridge act authorized bridge companies to permit railroad companies to extend their tracks over bridges belonging to the former. The powers conferred upon a bridge company were conferred upon a railroad company which was authorized, in connection with its railroad bridge, to erect a bridge for the passage of teams, carriages and foot passengers. It was also provided that all railroads might run their cars over the bridge. A bridge was built which formed a necessary part to the railroad company's track, although it was also used for carriages and foot passengers. *Held*, that the bridge so built was not a toll bridge, but was a railroad bridge and assessable as an integral part of the railroad.

Same—Board of Equalization—Powers—Review.—Although the Missouri State Board of Equalization is empowered to assess taxes on toll bridges and to determine what bridges are toll bridges, the question whether a bridge is in fact a toll bridge is jurisdictional and the conclusion of the State board in that respect is reviewable by the court.

APPEAL from Circuit Court, Clay County.

Suit by the State, on the relation of Tillery, collector of taxes of Clay county, against the Hannibal & St. Joseph R. Co. to recover taxes assessed against the defendant for the tax year ending August 18, 1883. Both parties appeal.

H. F. Simvall, James L. Sheetz and D. C. Allen for plaintiff.

Strong & Mosman, and Warner, Dean & Hagerman for defendant.

BLACK, J.—For the tax year ending August, 1883, the State Board of Equalization assessed the defendant's bridge over the Missouri river at Kansas City as a toll-bridge, placing the valuation at \$500,000. The bridge being in two counties, one half of this valuation was certified down to Clay county, and on that the county court levied taxes for that year. This is a suit to enforce the payment of the taxes thus levied. The circuit court gave judgment for plaintiff, except

Facts.

for the item called "funded debt tax," and as to that found for the defendant. Both parties appealed.

The case was here before on the plaintiff's appeal from a judgment sustaining a demurrer to the petition. While the petition states that the bridge is owned by the defendant, it also states that it is a toll-bridge, and does not disclose the fact that it is a part of the defendant's road. On this state of the pleadings we held, and could only have held, that the bridge was properly assessed as a separate structure. On the return of the cause defendant denied the above allegation, and averred the fact to be that the bridge formed a part of the railroad itself, and on this allegation the plaintiff made an issue of fact. It is therefore plain that we have to deal with another and different question from that considered on the former appeal.

**Decision
upon former
appeal.**

The Kansas City, Galveston & Lake Superior Railroad Company was created by the act of February 9, 1857, with power to build a railroad from Kansas City northward, and to bridge navigable streams. By authority of law, the name was changed to the Kansas City & Cameron Railroad Company, and the fourth section of the amendatory act of March 11, 1867 (Laws 1867, p. 143), provides: "The said railroad company shall have the same authority, rights and powers as are conferred upon the Kansas City Bridge Company, incorporated by an act of the general assembly of February 20, 1865, and may, in connection with its railroad bridge, erect a bridge for the passage of teams, carriages, and foot passengers, and shall have the same right and authority to receive compensation therefor as are granted to the said Kansas City Bridge Company; and all railroad companies whose roads shall terminate at or near such bridge, on either side of the Missouri river, or which shall construct a branch road to such bridge, shall have the right to run their cars and engines on and over such bridge at such times and on such terms as may be agreed on between the companies respectively; and, if such companies shall not agree on such terms, then on such terms as shall be prescribed by the governor of this State." The bridge act provides, among other things, that "when said bridge is completed the said company shall be entitled to demand and receive tolls for crossing the same, and to fix the rates of toll, of which a schedule shall be kept conspicuously posted at each end of the bridge; which rates shall be as follows, and shall never exceed the same, to wit: . . . And said bridge company may permit any railroad company to extend their railroad track over said bridge upon such terms as may be agreed upon by said bridge company and such railroad companies."

**Statute
authorizing
erection of
bridge.**

The Kansas City Bridge Company failed to build a bridge, but

the Kansas City & Cameron Railroad Company constructed its road from Kansas City to Cameron, and in doing so, and under the authority of law before stated, built the bridge in question. Thereafter, and in 1870, that company and defendant were consolidated.

The structure is an ordinary railroad bridge, with a plank floor between and on either side of the rails for the passage of teams, vehicles, and the like, and for such use tolls are charged. The bridge, and defendant's tracks in connection therewith, are used by a number of other railroad companies for the passage of their trains, they paying a rental therefor. These rentals paid by other railroad companies are not denominated tolls in the law under which the bridge was built, nor are they tolls in the sense in which we use the term when speaking of toll bridges. From these facts, and especially the law by authority of which this bridge was built, there can be but one conclusion, and that is this: The bridge is an integral part of the roadbed and track of defendant's road from Kansas City to Cameron, with a highway toll feature attached to it as a mere incident, and a small and inadequate one at that. The tolls collected amount to only about \$4,000 per annum. With this conclusion we now come to the statutes which provide for the assessment of toll-bridges, and for the assessment of railroad property, and the question is, under which should the bridge be assessed?

The act of April 21, 1877, was carried into the revision of 1879 without change. The first section, now section 6901, enacts that "all bridges over streams in this State, or over streams dividing this State from other States, owned by joint-stock companies, and all such bridges where a toll is charged for crossing the same, . . . and all property, real and personal, including the franchises owned by telegraph and express companies, shall be subject to taxation, . . . and the president or other chief officer of any such bridge, telegraph or express company, or the owner of any such toll-bridge, are hereby required to render statements of the property of such bridge, telegraph or express company, in like manner as the president or other chief officer of railroad companies are now or may hereafter be required to render for the taxation of railroad property." It is to be observed that railroad property is not mentioned in this act.

A few days after the passage of the above act, and on May 2, 1877, the legislature passed another act relating to the assessment of railroad property (Acts 1877, p. 366). The substantial parts of this act were carried into the Revised Statutes by way of a revised bill Section 6866 makes it the duty of the president or other chief officer of every railroad company to furnish the State auditor

each year, by a designated date, a verified statement, "setting out in detail the total length of their road so far as completed, including branch or leased roads, the entire length in this State, and the length of double or side tracks, with depots, water tanks, and turntables, the length of such road, double or side tracks, in each county, municipal township, incorporated city, town or village through or in which it is located in this State; the total number of engines and cars of every kind and description, including all palace or sleeping cars, passenger and freight cars, and all other movable property owned, used or leased by them on the 1st day of August in each year, and the actual cash value thereof." The State board is then required to assess the aggregate value of all such property belonging to any railroad company, and to apportion that value to the counties, townships, etc., according to the mileage of the railroad therein. Section 6876 declares: "All property, real, personal or mixed, including lands, machine and work shops, round houses, ware houses, and other buildings, goods, chattels, and office furniture of whatever kind, owned or controlled by any railroad company or corporation in this State, not hereinbefore specified, shall be assessed by the proper assessors in the several counties, cities, . . . wherein such property is located, under the general revenue laws of the State, and the municipal laws regulating the assessments of other local property in such counties, cities, . . . but the taxes on the property so assessed shall be levied and collected according to the provisions of this article."

Now, it will be seen that the statute relating to the assessment of railroads includes and provides for the assessment of all railroad property of every kind and description. The road and rolling stock must be assessed as a whole, and then a distribution made to the counties according to the mileage therein. All other property must be assessed by the local assessors as local property. All bridges belonging to the railroad company, and forming a part of the road, must be included in the assessment of the road, and cannot be detached for the purpose of taxation. Nor is there anything in the bridge act in conflict with what has just been stated. In former years many bridge companies were created by special acts; they are now organized under the general law. Toll-bridges owned by such corporations are properly assessed under the bridge act, and this is true though the bridge may be used in part for the passage of trains of cars. So, too, if the bridge is owned by the railroad company, and is a part of the railroad, it must be assessed and taxed with the road itself, and it thus enters into the aggregate value of the entire road; and in such cases it makes not a particle of difference that the bridge is in part a toll-

**Assessment
of railroad
property.**

**Bridge
assessable
as part of
railroad.**

bridge for the passage of teams, wagons, and the like. The statutes must be construed together, and they are consistent with each other. Any other construction of the bridge act makes it repeal in part the law relating to the assessment and taxation of railroad property. It appears that in former years the State board assessed this and like bridges as constituting a part of the railroad, and that practice was in accord with the plain meaning of the law. It follows that the board had no power to assess this bridge as a separate structure. The assessment is void, and lays no foundation for the levy of the taxes sued for.

The point is made by the plaintiff, that as the State board has power to assess toll-bridges, it has the power to determine what bridges are toll-bridges; that, as the value fixed by the board is conclusive, so is the finding that the bridge is a toll-bridge conclusive. The board has the power to assess toll-bridges, and it may be conceded that the courts would not review the finding as to value; but it does not follow that it can change the character of the property. Unless the bridge comes within the bridge act, the board has no power to assess it under that act. Authorities are also cited which show that, in general, assessing officers are not personally liable for erroneously listing persons or property for taxation, but they are without application to the present case. With these conclusions, it is unnecessary to consider the question made on the plaintiff's appeal. The judgment is therefore simply reversed.

BARCLAY, J., not sitting. The other judges concur.

Taxation of Bridges—Missouri River.—Section 39 of chapter 77 of the Compiled Statutes of Nebraska, entitled "Revenue," requires the officers of the railroad corporations within the State to return to the auditor of public accounts for assessment and taxation the number of miles of railroad in each organized county, and the total number of miles in the State, including roadbed, right of way, and superstructure thereon, main and side tracks, depot buildings and depot grounds, section and tool houses, rolling stock and personal property necessary for the construction, repairs, or successful operation of the railroad; but does not require a return of the bridges constructed across the Missouri river, said river being a navigable stream, the right to bridge which can be obtained only by a law of congress, and not by the authority of the State,—such bridge, when constructed, not being a part of the roadbed, nor superstructure thereon, under the meaning of the section alluded to. The state board of equalization would have no jurisdiction or authority to include such bridge within the line of roadbed of the railroad for taxation, and could therefore levy no legal tax thereon. Such bridge not being within the definition of "roadbed, right of way, and superstructure thereon," it was held that such part thereof as is within any county of this State would be liable to assessment and taxation by the local assessing and taxing officers of such county. *Cass County v. Chicago, Burlington & Quincy R. Co.* (Neb.), 41 N. W. Rep. 246.

Taxation—Assessment of Bridges.—See note, 33 Am. & Eng. R. R. Cas. 486; *Huntington v. Worthen*, 120 U. S. 97; s. c., 29 Am. & Eng. R. R. Cas. 230; *Anderson v. Chicago, B. & Q. R. Co.*, 25 Ib. 522; *Chicago, M. & St. P. R. Co. v. City of Sabula*, 13 Ib. 443; *Alexandria Land etc. Co. v. Dist. of Columbia*, 7 Ib. 325.

MAYOR, ETC., OF NEW YORK

v.

DRY DOCK, EAST BROADWAY AND BATTERY R. CO.

(*New York Court of Appeals, January 15, 1889.*)

Street Railway—Franchise—License Tax.—A railroad company was by statute authorized to operate a railway upon certain streets subject "to the payment to the city of the same license fee annually for each car running thereon as is now paid by other city railroads." The license fee then payable was \$50 for each two-horse car and \$25 for each one-horse car. By a subsequent statute the company was authorized to extend its tracks subject to the payment of 5 per cent. of the net proceeds of the cars running on such extension, and all acts inconsistent with the provisions of the act authorizing the extension, were repealed. *Held*, that the two statutes must be deemed to have created different franchises, that they were not inconsistent with each other, and that the company must pay the license fee and a percentage if it wished to claim the benefit of both statutes.

APPEAL from General Term of the Supreme Court, First Department.

John M. Scribner for appellant.

D. J. Dean for appellee.

DANFORTH, J.—The defendant, under the act of 1860, c. 512 (passed April 17, 1860), was authorized to operate and use a railroad upon certain streets in the city of New York, and among others Grand street, east of East Broadway, subject, among other things, "to the payment to the city of the same license fee annually for each car run thereon as is now" (April 17, 1860) "paid by other city railroads in said city." The franchise was accepted, and the defendant, under the proof concerning license fees paid by other then existing railroads, became liable to pay \$50 for each two-horse car, and \$25 for each one-horse car run by them on the streets named. This result follows from the decision of this court in the case of Mayor, etc., v. Broadway & S. A. R. Co., 97 N. Y. 275, where a statute containing similar provisions was considered, and concerning that liability no question now arises.

In 1866 (Laws 1866, c. 883) the defendant was authorized to extend its tracks from the junction of East Broadway and Grand street, through Grand street and other streets, to the North river, subject, however, in case it accepted the franchise conferred by the act, to the payment into the treasury of 5 per cent. of the net proceeds of the cars run on such extension; and (section 7) all acts and parts of acts inconsistent with the provisions of the act were repealed, so far as they were in conflict therewith.

Some rights in other streets were acquired under other acts (Laws 1866, cc. 866-868), but they contain no provisions respecting license fees, or compensation to the city. Under these

Statute various acts the defendant, since 1866, has operated
authorizing four distinct railroad routes under separate names,
extension. one of which is designated as the Grand Street Line."

It is operated by cars run separately from those of other lines, and over the streets named in the act of 1866 (chapter 883), in connection with some of those named in the other act of 1866 (*supra*), and through Grand, Greenwich and Washington streets, to East Broadway, streets designated and indicated in the act of 1860 (chapter 512). The defendant has paid percentages of its receipts for cars running over this route, as provided by the act of 1866 (chapter 883), and the question for our determination is whether it is also liable to pay a license fee under the act of 1860 (chapter 512).

If, as the learned counsel for the appellant contends, the grant expressed by the act of 1866 (chapter 883), and its acceptance constitute a contract between the defendant and the State, it is

to be construed as the language of the defendant, who derives a great privilege under it; and if either from
Each fran- ingenuity or carelessness it fails in expression, and leaves
chise subject a doubt as to its meaning, the doubt should be solved
to burdens against the company, and liberally in favor of the public.
in statute The defendants can claim nothing that is not clearly
granting it. given to them by the act. In this view the case was

treated by the general term (47 Hun 199). We find no difficulty, however, in sustaining the judgment upon the plain language of the several statutes. By the act of 1860, *supra*, the license fee is imposed upon every car running upon the streets named in it. It being conceded that the cars of the defendant are operated on those streets, it is for them to show exemption from the tax. To that end the learned counsel for the appellant claims that the act of 1866 (chapter 883) repeals the license provision of the act of 1860. That would be so if either the provision made for compensation to the city by the act of 1866 was in conflict with the provision in the act of 1860, or if it covered the whole subject. It seems to do neither. The several schemes control different groups of streets, and although the last, that of 1866, is described as an "extension," the act authorizing it does not profess to be and is not in any sense an amendment of the first,—that of 1860. Each franchise stands upon the authority of, and subject to the burden imposed by, a distinct statute; and, if the defendant avails itself of the privileges offered by both, we see no ground on which it can be relieved from paying the price exacted for it. The two statutes are not contrary in matter, they lead to no absurd consequences, and it cannot be doubted that, had the legis-

lature intended that one should in any respect abrogate the other, or that any provision in one should stand in lieu of any provision in the other, that intention would have been expressed. It has not been, and there is nothing in the words used by them from which it can be implied. Both statutes are in operation. If placed side by side, nothing can be found in one inconsistent with anything found in the other; and if the defendant pays the license fee prescribed by the first, and the percentage called for by the other, and so complies with the conditions upon which the company received in succession the respective franchises, it will not have made a double payment, nor have paid twice for the same thing.

We agree, therefore, with the general term, and in pursuance of the stipulation the plaintiff have judgment absolute.

License and Privilege Taxes.—See *Pullman Palace Car Co. v. State*, 64 Tex. 274; s. c., 29 Am. & Eng. R. R. Cas. 194, note, 200.

CHICAGO AND ALTON R. CO.

v.

LAMKIN, *Collector*.

(*Missouri Supreme Court, December 20, 1888.*)

Taxation—School Buildings—Constitutional Law.—The Missouri Act of 1885, amending § 6880 of the Missouri Revised Statutes, which authorizes a county to ascertain the average rate of taxation levied for the erection of public buildings by the several school districts, and which declares that such average rate levied for the erection of public buildings shall be ascertained by adding together the local rates of districts in the county levying a tax for the erection of public buildings, and by dividing the same thus ascertained by the whole number of districts, and directs the clerk to charge the railroad companies taxes for the erection of public buildings at said average rate, and the county court to apportion to said taxes among the several school districts levying such taxes, in proportion to the amount of taxes levied in such district, is not unconstitutional, as giving a portion of the taxes levied upon the property of one district to another, notwithstanding the fact that a portion of the taxes so levied is payable to a school district in which the railroad does not run.

Same—Constitutional Limit—Vote of District.—If a tax levied by a school district has been increased by a vote of the district beyond the limit of 40 cents on the \$100 valuation, as authorized by the constitution, such rate, as increased by the vote, becomes the limit described by the constitutional provision.

APPEAL from Circuit Court, Saline County.

Suit by the Chicago and Northern Railroad Company against John C. Lamkin, collector of Saline County, for an injunction to restrain the collection of certain school taxes. The plaintiff appeals for a decree dismissing the bill.

G. B. MacFarlane (*George S. Grover*, of counsel) for appellant.

A. F. Rector for respondent.

NORTON, C. J.—The state board of assessment and equalization of railroad property certified to the county court of Saline county for taxation the valuation of the apportionment to said county of plaintiff's roadbed and rolling stock, amounting to the sum of \$568,607.19. The county court levied a tax of 39½ cents on the \$100 of this valuation. The tax at said rate amounted to \$2,255.48. The said rate of tax was ascertained by adding together the rates levied by each of the school districts in the county, and then dividing the sum thereof by the whole number of school districts. It is admitted that some of the said school districts, through which the roadbed of plaintiff did not run, had voted at an election properly held to increase the rates therein, for school purposes, above the limit of 40 cents on the \$100 of valuation. The county court also levied a tax of 5¾ cents on the \$100 of said valuation for public buildings in the school districts, amounting to \$326.95. The taxes so levied for "school purposes" and building purposes aggregated the sum of \$2,582.43. The said rate for building purposes was ascertained by taking the average of the rates levied in the districts of the county for buildings in school districts. It is conceded that these rates and levies were made in conformity with section 6880, Rev. St., as amended by Laws 1885, p. 230. Plaintiff paid all of the said taxes except \$300, and instituted this proceeding by injunction against the collector of said county to restrain him from the collection of said sum upon the alleged ground that so much of the levy as was made for building purposes was illegal and void. The trial court dismissed the bill, gave judgment for defendant, and plaintiff appealed therefrom; and the real question presented by the appeal is, did the county court have the right, under the constitution and existing laws, to levy a tax on the apportionment of the valuation of plaintiff's roadbed and rolling stock, at the rate of 5¾ cents on the \$100 valuation for public buildings erected in school districts where tax rates had been voted for that purpose in districts through which plaintiff's road did not run? The existence of this power is affirmed by defendant, and denied by plaintiff.

The constitution provides in section 11, art. 10, among other things, that the annual rate of taxation on property for school purposes "shall not exceed forty cents on the \$100 valuation: provided, the aforesaid annual rates for school purposes may be increased in districts formed of cities and towns to an amount not to exceed one dollar on the hundred dollars valuation, and in other districts not to exceed sixty-five cents on the hundred dollars valuation, on the condition that a majority

Constitutional provision regulating school taxes.

of the voters who are tax payers voting at an election held to decide the question vote for said increase. For the purpose of erecting public buildings . . . in school districts the rates of taxation herein limited may be increased, when the rate of such increase, and the purpose for which it is intended, shall have been submitted to a vote of the people, and two-thirds of the qualified voters of such . . . school district voting at said election shall vote therefor." In the case of *State v. Wabash, St. L. & P. R. Co.*, 83 Mo. 395, while it was held that section 6880, Rev. St., authorized the levy of a tax for school purposes on the apportioned valuation of the road-bed and rolling stock of a railroad company, first ascertaining the rate of such tax by adding together the local rates of the several school districts in the county, and dividing the sum thus ascertained by the whole number of districts, it was also held that said section did not authorize the levy of a tax on such valuation for public buildings in school districts. In 1885 (Laws 1885, p. 230), the legislature, to supply this omission, so amended said section 6880 as to authorize the county to ascertain "the average rate of taxation levied for the erection of public buildings . . . by the several local school boards or authorities of the several school districts throughout the county. Such average rate levied for the erection of public buildings . . . shall be ascertained . . . by adding together the local rates of the districts in the county levying a tax for the erection of public buildings, . . . and by dividing the sum thus ascertained . . . by the whole number of districts in the county, and the clerk shall cause to be charged to said railroad companies taxes for the erection of public buildings . . . at said average rate on the proportionate value of said railroad property so certified to the county court under the provisions of this article, and the county court shall apportion the said taxes for the erection of public buildings . . . so levied and collected among the several school districts levying such taxes, in proportion to the amount of such taxes so levied in each district."

It is conceded, in this case, that the rate of tax levied on plaintiff's property, both for school and public building purposes, was ascertained in the mode prescribed by the legislature in said section 6880, as amended. But it is insisted by appellant's counsel that, inasmuch as it is contemplated by the constitution that where the rate of taxes has been increased for the erection of public buildings in a school district, that such rate shall be levied on property in the district voting the increase, the law authorizing the county court to take such rate of increase, made in districts through which plaintiff's road does not run, into consideration in fixing the rate to be levied on plaintiff's road for public buildings so erected, is invalid and void. And in support of this contention we have

**Taxes for
school and
public
buildings.**

been cited to the case of *Wells v. City of Weston*, 22 Mo. 384, where it is held "that the legislature cannot authorize a municipal corporation to tax, for its local purposes, lands lying beyond the corporate limits." The principle announced in the above was held not to apply to the assessment and levy of taxes on railroads, in the *Railroad School Tax Case*, 78 Mo. 596, which was a case where the constitutionality of an act of the legislature was called in question, which authorized county courts, in levying school taxes on the assessed valuation of a railroad bed and rolling stock, to levy for school purposes the average rate of taxes levied for school purposes by the several local school boards through which each railroad runs, and which required the tax so levied to be apportioned to the other school districts of the county as well as the districts through which the road ran, in the proportion the number of children in each district bore to the whole number of children in said county. There were 69 districts in the county, and the railroad passed through 12 of them. It was contended that the act of 1875, which authorized the levy and distribution of the tax, was unconstitutional in that it gives a proportion of the tax levied on property in one township to other townships, and the case of *Wells v. City of Weston*, *supra*, was cited as authority in support of the contention; and it was distinctly held in the above case that the roadbed of a railroad is chiefly valuable as an entirety, and its subdivisions within the limits of a county or school district are not to be treated as local property under the act of 1875 for the assessment and distribution of railroad taxes; that school taxes on such roadbed apportioned to a county are properly distributed to the school districts therein, in the proportion that the number of school children in each school district bears to the whole number in the county, and the act providing for such distribution is not unconstitutional as giving a portion of the taxes levied upon the property in one district to another. While section 6880, Rev. St., changes the method for ascertaining the average rate of school taxes to be levied on railroads, it does not affect the principle announced in the above case.

The doctrine announced in 78 Mo., *supra*, has been affirmed in cases of *School District v. Rhoads*, 81 Mo. 474, and *State v. Missouri Pac. R. Co.*, 92 Mo. 137; 20 Am. & Eng. R. R. Cas. 45. In the last case above cited, where so much of said section 6880 as related to the method of ascertaining the average rate of taxes to be imposed on railroads for school purposes was under discussion, the constitutionality of which was challenged, it is said: "It is provided by section 11, art. 10, of the constitution, among other things, that 'for school purposes the annual rate on property shall not exceed forty cents on the one hundred dollars valuation.' The statute in question would only be violative of said section, and

Law
authorizing
tax for
building
purposes
valid.

even in that case only to the extent of such excess." And it is further said: "It is certainly within the power of the legislature to authorize the imposition of school taxes on the property of defendant, and, considering the nature of its property, and the fact as stated in 78 Mo. 596, 'that the roadbed is chiefly valuable as an entirety;' that its aggregate value is made up because of its continuity; that the portion of a railroad in a county, when considered as disconnected with a continuous line, would in most cases be of little or no value, considering these things in connection with the further fact that the rolling stock of defendant, constituting a large and valuable part of its property, cannot be localized in any one county, it being from its very nature constantly changing from one county to-day and another to-morrow, we cannot say that said section 12 of the act of 1873 is violative of the fourteenth amendment, inasmuch as under the construction we put upon it the average rate to be applied to defendant's property must not exceed the limit prescribed in the constitution." If, as is held in the cases cited, the law prescribing the method of ascertaining the rate of tax to be levied on the valuation of a railroad apportioned to a given county for "school purposes," is valid and constitutional, it necessarily and logically follows that the law prescribing the method of ascertaining the rate of tax to be levied for "building purposes" in school districts is also valid; for it is in contemplation of the constitution that both the tax authorized to be levied for school purposes as well as the tax for building purposes should be levied on property in the districts fixing the rates for such purposes. Express power is given by section 5, art. 10, of the constitution, to tax all railroad corporations for school purposes; and in the exercise of this power it is competent for the legislature to classify such property for purposes of taxation, the principal restriction being that the tax shall be uniform upon the same class of subjects within the territorial limits of the authority imposing the tax, and that such tax shall be levied and collected by general laws.

The case in 92 Mo., *supra*, is cited by counsel as holding that in no case can the rates of taxes on the valuation of a railroad for school purposes exceed 40 cents on the \$100 valuation.

This is a misapprehension. It is there held that if the law under which the tax imposed in that case authorized a rate of tax to be levied in excess of the limit prescribed by the constitution, it would be invalid, and what is there said with reference to the constitution having fixed the limit at 40 cents on the \$100 valuation, was said without reference as to whether that rate had been increased by a vote as therein authorized. As the constitution authorizes said limit of 40 cents on the \$100 valuation to be increased by a vote, when it is so increased by such vote under the law authorizing an

Constitutional limit of rate of taxation.

election to be held for that purpose, the limit of 40 cents is moved up to such increased rate by the very terms of the constitution, and such rate, so increased, is as much a limit prescribed by the constitution as if inserted therein.

Judgment affirmed, in which all concur, except RAY, J., absent.

School Taxes - Construction of Missouri Statute.—Note, 25 Am. & Eng. R. R. Cas. 539; *In re* Railroad School Tax, 78 Mo. 596; s. c., 17 Am. & Eng. R. R. Cas. 491.

COMMONWEALTH, TO USE OF MARION COUNTY

v.

LOUISVILLE AND NORTHERN R. CO.

(*Kentucky Court of Appeals, November 27, 1888.*)

Taxation—County—Special Act.—The Kentucky act of 1864, assessing railroads within the State at \$20,000 per mile, renders the tax upon railroads specific in its nature and chargeable against each railroad an entirety; and railroads are not subject to fragmentary and local taxation unless specifically authorized. Hence, a statute authorizing a county to levy a tax "on the taxable property in said county listed and taxed under the revenue laws of the State," does not authorize the assessment of railroads by the county.

APPEAL from Circuit Court, Marion County.

Summons in the name of the Commonwealth, to the use of Marion county, against the Louisville & Northern R. Co., requiring the latter to show cause why its railroad in said county should not be assessed for certain taxes. The plaintiff appeals from a judgment for the defendant.

A. Duvall and *S. T. Spalding* for appellant.

Wm. Lindsay and *H. W. Bruce* for appellee.

BENNETT, J.—Marion county, the appellant, caused a summons to issue from the Marion county court against the appellee, to show cause why its railroad, etc., in said county should not be assessed for the years 1867, 1871, 1872, 1873, and 1875, under the acts of 1865, 1867, 1869-70, and 1869, which authorized the appellant to levy and collect *ad valorem* taxes on the taxable property in said county, for the benefit of the county. The appellee, by its response, denied that its property in said county was subject to be assessed by the county for said years, or any of them. The county court ordered its clerk to assess the appellee's road in said county at the rate of \$20,000 per mile for each of said years. Upon appeal by

Statement
of case.

the appellee from said judgment to the circuit court, the judgment of the county court was reversed, and the appellant's proceedings were dismissed. The appellant has appealed to this court.

By the act of the legislature of 1864, all the railroads, etc., in this State, were assessed at \$20,000 per mile. The president, etc., of each road, were required, on or before the 10th day of July of each year, to furnish, under oath, to the auditor of the State, the length of the road, and its branches, etc., belonging to them; and each road was required to pay the same rate of tax on said assessment as was levied by law upon real estate. So by said act the tax upon railroads is specific. This court in the case of *Appelegate v. Ernst*, 3 Bush 648, held that, in the absence of a statute expressly authorizing it, a railroad, for the reason that it was an entirety, could not be legally assessed in fragments; therefore the portions of the roads in each county could not be assessed in such county for local purposes. Also, in the case of *Louisville & N. R. Co. v. County Court*, 5 Bush (Ky.) 246, this court, reciting the same doctrine, held that, under an act of the legislature of the State passed in 1856, authorizing Warren county to collect an *ad valorem* tax, to be levied on all the property in said county, "listed for taxation for revenue purposes," the county of Warren had no power to force the Louisville & Northern Railroad Company to pay taxes on its road in said county. The court, in that case, held that as the road from end to end was an entirety, it was not subject to fragmentary taxation, unless such taxation was expressly authorized by an act of the legislature; that enactments of the legislature authorizing local *ad valorem* taxation should not be made to apply to railroads by construction. The cases of *Railroad Co. v. Elizabethtown*, 12 Bush 233; *Graham v. Coalroad Co.*, 14 Bush 425; *County Court v. Louisville & N. R. Co.*, 7 Ky. Law Rep. 810,—construe the 3 and 5 Bush cases as above indicated. But the appellant contends that the acts of 1865 and 1869 are more comprehensive than the act relied on in the 5 Bush case, and therefore included the appellee's road.

The act of 1865 authorized a tax to be levied "on all property of said county liable to taxation for State revenue." The act of 1869 authorized a tax to be levied on "the taxable property in said county listed and taxed under the revenue laws of this State." The act relied on in the 5 Bush case means that Warren county was authorized to levy and collect an *ad valorem* tax on all property in the county subject to taxation under the general revenue laws of the State. The language of the acts of 1865 and 1869 means no more. The railroads of the State at that time were not taxed under the general revenue laws of the State, but were taxed specific-

Taxation of
railroads.

Power of
county
to tax
railroad
property.

ally, at the rate of \$20,000 per mile. Also, according to said decisions, each railroad in the State was regarded as an entirety, and was not subject to fragmentary taxation, unless such taxation was expressly authorized. It follows that the railroads of the State, according to said decisions, were not subject to local taxation by implication. Therefore the legislature, by an act approved March 17, 1876, recognizing the fact that the railroads in this State, by reasons of said decisions, were not subject to local *ad valorem* taxation, expressly subjected them to such taxation. From what has been said, it follows that neither the act of 1865, nor the act of 1869, expressly includes the appellee's road. Therefore, still adhering to the views expressed in the case of *County Court v. Louisville & N. R. Co.*, 7 Ky. Law Rep. 810, we are constrained to hold that under the law as it was construed by this court in the 3 and 5 Bush cases, above referred to, the appellee's road should not be subjected to the appellant's taxes for the years 1866, 1867, 1870, 1871, 1872, 1873, 1874, and 1875.

The appellant also contends that the circuit court should have dismissed the appellee's appeal, on the ground that the decision of the county court was a ministerial, and not a judicial, act. The powers of the county court, in cases like this, are conferred by sections 22, 25, art. 5, c. 92, Gen. St. p. 723, and not by the auditor's agent act. By said sections the county clerk, upon information filed by the sheriff, may summon the supposed delinquent to appear and show cause why his property should not be taxed. The supposed delinquent may show cause, either legal or equitable, why his property should not be taxed. He may go so far as to show that the act of the legislature authorizing the tax was unconstitutional, etc.; or he may show that, by a fair construction of the statute, his property does not fall within the provisions of the law. All of which the appellee attempted in this case, and it was the duty of the county court to pass upon these questions, which it did; also, if the respondent is found wilfully delinquent, it is the duty of the court to impose a penalty upon him; upon which question the court passed in this case. If the respondent is not found wilfully delinquent, but it is found that his property is liable to the tax, the court directs the clerk to assess it. The court, in such case, simply passes upon the question as to whether the property is liable to be taxed. So it will be seen that a simple statement of the duty of the court shows that his act is judicial.

The judgment of the circuit court is affirmed.

Taxation—Assessment of Railroad as Unit.—See *Franklin County v. Nashville C. & St. L. R. Co.*, 12 Lea (Tenn.) 521; s. c., 17 Am. & Eng. R. R. Cas. 445; note, 456; *In re Railroad School Tax*, 78 Mo. 596; s. c., 17 Am. & Eng. R. R. Cas. 491.

DELAWARE BAY AND CAPE MAY R. CO.

v.

MARKLEY.

(New Jersey Court of Errors and Appeals, January 23, 1889.)

Receiver—Appointment—Court of Chancery.—The act (Supp. Revision, p. 834, pl. 42) authorizing the chancellor to appoint a receiver, if a railroad neglects to run daily trains, confers such power upon the court of chancery, and not upon the chancellor in his personal capacity.

Same—Reference—Advisory Opinion.—The chancellor can refer, in the ordinary course, such matter to a vice-chancellor, and to a master, for hearing and an advisory opinion.

Same—Vice-chancellor—Jurisdiction.—A vice-chancellor cannot entertain jurisdiction over a case, except when referred to him by general or special order.

Same—Waiver of Objection.—But when the case was heard by the vice-chancellor without objection, and the chancellor adopted his advice, and signed a decree, *held*, it was too late to raise on appeal the question as to the vice-chancellor's right to hear the case.

Same—Appointment—Failure to Run Trains.—Notwithstanding the fact that a railroad company has been incorporated under the New Jersey general railroad law, and has declared its purpose of doing a general business in the transportation of freight and passengers it is (if its road otherwise answers the description), within the purview of the act of March 3, 1880, which declares that the act of February 12, 1874, which authorizes the appointment of a receiver of any road which has not operated its road for ten days, shall not apply to any railroad company whose road is constructed at any seaside resort, does not exceed four miles in length, and is built and intended merely for the transportation of summer travellers and tourists.

Same—Statute—Retrospective Effect.—The act of March 3, 1880, is retrospective in its operation and applies not only to roads thereafter constructed, but also to roads in operation at the time of its enactment.

Same—Constitutionality—Special Legislation.—Said statute is not unconstitutional as a special act conferring corporate privileges, the railroads to which it applies forming a distinct class.

PETITION alleging a violation by the Delaware Bay & Cape May R. Co. of a statute of New Jersey in that it had failed for more than ten days to operate its road, and praying for the appointment of a receiver. The application was argued before Bird, V. C., and upon his advice the receiver prayed for was appointed. The opinion of the vice-chancellor was in the following terms:

BIRD, V. C.—This company was organized under the general railroad law passed in 1873. Rev. 925, §§ 89, 90.

It declared its purpose to be doing general business in the transportation of passengers and freight. It constructed its road from Cape May City to the steamboat landing, in all less than four miles in length. It passed through the Village of Cape May, where 200 to 300 inhabitants reside permanently, and where several hundreds more reside in the summer — whether many or few cannot be material

Opinion of
vice-
chancellor.

This village is commonly called a summer or seaside resort, although it is not entirely deserted or abandoned in the winter season, any more than many other places on the coast of New Jersey. One great object, certainly the main object, in building the road was to carry the passengers which should be brought to the steamboat landing by the steamer Republic from Philadelphia. This steamer only runs during the summer season. While to receive and carry these passengers was the main object, its declared purpose was not only to carry freight but it has actually carried freight from Cape May City to Cape May.

It commenced operations in the year 1879 and continued to run its trains over the entire length of the route until 1883, during the entire year. At times since then it has not been operated all the year.

The petition shows that the road has not been operated for more than ten days, and asks for the appointment of a receiver to take possession of said road, and to transact the ordinary business thereof in the transportation of freight and passengers for such a time as the court may direct, according to the act of February 12, 1874, Rev. 943, § 160.

In resisting this application the defendant relies upon the provisions of the act of March 3, 1880, Sup. to Revis. p. 834, which provides that "Any railroad company whose road is constructed at any seaside resort, not exceeding four miles in length, and which was built and intended merely for the transportation of summer travellers and tourists, shall be excepted from the operation of the act of February 12, 1874," *supra*, and also upon the allegation that it was never intended to be a general freight and passenger road, but only a passenger road to be operated during the summer season.

With great respect to the counsel who pressed the latter point, I must remark that it seems to me to be of no consequence what the secret motive and intention of the corporators was.

Effect of The law declared the conditions upon which they should
incorpora- or could build a railroad. In form and in such articles
tion under as the law prescribes, those corporators accepted the
general conditions and declared their intentions, which were
railroad act. in harmony with the conditions. Now, if under a pressure of any nature, whatever, they can so far forget their solemn obligations to the public which has granted to them these peculiar privileges and guaranteed to protect them in the right to use of them, as to insist that the law of 1873 is not binding, and that their own declared intentions are not binding beyond their own mere will, they certainly ought not to expect any court to concur with them in such insistent. As the law stood when this road commenced operations, it was the duty of the company to transport passengers and freight by running trains over its road

daily. It strikes me that any other conclusion, if acted upon, would lead to the most dangerous and destructive consequences thousands, hundreds of thousands, even millions of dollars worth of property might be involved at the option of a company.

But the act of February 12, 1874, was amended by an act of March 3, 1880, Sup. to Rev. p. 834, § 42, which provides that the act directing the appointment of a receiver shall not apply to roads built at seaside resorts. (Set out fully above.) Can this provision be claimed as a protection to the defendant company? I think not. It was not enacted until after the road had been built and operated. There is nothing in the language of the act indicating the slightest intention of the legislature to bring within its provisions any of the numerous roads which had then been constructed between Cape May and Sandy Hook; and the only facts in connection with this road that seems to have any relation to the law are that it is less than four miles in length and that there are two towns, one at each end and one through which it passes, properly called summer resorts, and that tourists visit them; all of which, except the first, *i. e.* the length, may be said of many others. I do not feel myself at liberty to give this provision any retrospective operation. I am sustained in this view by the case of *Williamson v. N. J. Southern R. R. Co.*, 2 Stew. Eq. 311; *Elizabeth v. Hill*, 10 Vroom. 555; *Den, Berdan v. Van Riper*, 1 Harr. (N. J.) 14; *McGovern v. Connell*, 14 Vroom. 107. See the explicit language of the court of errors in *Citizens' Gas Light Co. v. Alden*, 15 Vroom. 648, 653, 654.

Appointment
of receiver—
Railroads
built at sea-
side resorts.

These railroads are made lawful and have extraordinary privileges, as well for the benefit and convenience of the public as for the profit of the corporators or their assigns, and if by the construction of them the company acquires vested rights, so, too, does the public acquire vested interests. Therefore, when individuals avail themselves of the inducements offered by these railroads to invest their capital in homes, or land for improvement, or in business, they have as high and sacred a claim to the consideration of the court as the railroad company. This observation is applicable to this case; for money has been invested in homes for residences the year through (not simply for the summer season) at Cape May the owners and others reside there the entire year, and they and others carry on business there, hence, it is very obvious that Cape May is no more a seaside resort or a place for summer than is a score of other places on our coast.

The views thus expressed make it unnecessary for me to dwell at length upon the constitutionality of the law under which the defendant seeks favor. It is urged that the proviso of the act in question is prohibited by that clause of the constitution in article 4, § 7, which declares that the legislature shall not pass any pri-

vate, special or local law, "granting to any corporation, association or individual any exclusive privilege, or immunity, or franchise whatever." Without fully discussing the question, I

cannot but ask: What general principle is involved in the idea of a road less than four miles in length?

What general good would such an enactment promote?

If such a law is not in conflict with the constitution, then, any railroad can secure to itself such rights and

immunities, whatever its length may be; for if the power exists in case the road is less than four miles, it certainly exists in every conceivable case when distance only is concerned.

But, it is said that another fact is to be noticed, *i. e.*, that the law under consideration provides that it shall apply to roads built "at seaside resorts" and "merely for the transportation of summer tourists," and these are such general phrases as fairly to avoid the prohibition of the constitution? The first phrase quoted may well enough be construed to apply to all seaside resorts, but leaves the court to define what is or is not comprehended therein, whether a place wholly or only partially abandoned during a part of the year. I cannot but think that every court would say that it must appear affirmatively in every such case, that the place was wholly abandoned at the time the company ceased its operations.

But it seems to me that it is enough to say the road in question was not established or organized on any such principles, for when so organized there was no law authorizing such a corporation.

Unless the company commences operations and runs its trains to carry both freight and passengers within five days from the time a copy of the order to be made in this case shall have been served upon one of its officers, I shall advertise the appointment of a receiver to operate the said road under the statute. -

The railroad company appealed to the court of error and appeals from the decree of appointment.

H. W. Edmunds and *S. H. Grey* for appellant.

William T. Hilliard for respondent.

BEASLEY, C. J.—The appellant was organized by virtue of the general railroad act of this State, to construct a railroad of less than four miles in length from a point on the Delaware river called "Steamboat Landing" to the city of Cape May. In pursuance of the authority thus obtained, the road was built and completed in the year 1879. In the month of October,

1887, the respondent, a resident of Cape May Point, in this State, filed his petition to the chancellor, representing that this company had failed and neglected for the space of ten days then last past to run daily trains on its road, and praying that a receiver should be appointed pursuant to

the statute (Supp. Revision, p. 834, pl. 42). The chancellor made an order that the application should be heard, after proper notice given. The appellant put in its sworn answer, and at the time designated the motion was heard, on the petition, answer, affidavits, and oral proofs. The defence interposed to the petition was that the road of the appellant was constructed at a sea-side resort, did not exceed four miles in length, and was built and intended merely for the transportation of summer travellers and tourists, and that it was, consequently, within the proviso of the act requiring the running of daily trains. The vice-chancellor advised the appointment of a receiver, and the chancellor accordingly signed the requisite order, which is the decree appealed from.

The first exception taken to this proceeding was that the chancellor had no power to delegate to the vice-chancellor the duty of appointing a receiver. The contention in support of this proposition is that the power in question is conferred, not upon the court of chancery, but upon the chancellor himself as an individual; his official appellation being used simply as *designatio persona*. If this postulate is to be yielded, it would follow, as an inevitable consequence that the statutory function in question would have to be discharged by the chancellor, for he would

Power of
chancellor
to delegate
appointment
of receiver.

be a mere commissioner empowered to do a special act, and it is obvious that such an authority could not be delegated. But we think such is not the proper construction of this statute. All through our legislative acts, when power has been conferred upon the court of chancery it has been the frequent practice to vest such power descriptively in the chancellor; his official designation being used as a synonym for that of his court. It is true that in the line of this usage ambiguities may obtain, making it difficult to decide whether the court or the individual were designed to be the depository of the power in the particular case. But no such obscurity prevails in the present instance, for we have but to look at the nature of the act required to be done to be convinced that it was the legislative design to call upon the court of chancery to effectuate the purpose in view. The very name of "receiver" implies a person deriving his authority from the court of chancery; for a receiver is one of the well-known agents of that tribunal, with his powers, immunities and responsibilities entirely defined; he is answerable to the court for each of his acts, and is completely under its supervision and control. On the other hand, if such receiver is to be appointed by the chancellor in his personal capacity, by the act of appointment the chancellor would become *functus officio*. He would have no superintendence over conduct of the officer thus selected by him, nor could he revoke the appointment, even though the necessity for a receivership had ceased. From these and the like considerations, we are of opin-

ion that it was plainly the legislative intention to lodge the appointing power in these cases in the court of chancery; the consequence being that it was lawful for the chancellor to refer the present litigation to either of the vice-chancellors, or to a master in chancery, for consideration and advice in the usual course.

The second objection to the proceedings is that, even on the assumption that the jurisdiction in the matter just considered was vested in the court of chancery, still the vice-chancellor was with-

Power of
vice chan-
cellor—
Necessity
of order of
reference—
Waiver.

out power to act when and as he did, because the chancellor did not refer the cause to him. There can be no doubt that the vice-chancellor cannot assume jurisdiction over a cause except by force of a reference made by the chancellor to that effect; and, as the rules of the court are now framed, there does not appear to be any power given to the vice-chancellor to take cognizance of causes so as to finally dispose of them upon the merits, except when there exists a special order for that purpose.

In the present instance this was not done, and the consequence is the hearing by the vice-chancellor was irregular, and would have been, if properly objected to, entirely nugatory. The course pursued was this: The counsel of petitioners, on a regular motion day before the vice-chancellor, presented this petition, and moved for a day to be set for the hearing. Upon the advice of the vice-chancellor an order was signed by the chancellor requiring the appellants to show cause on a certain day why the prayer of the petition should not be granted, and a receiver appointed, and requiring a notice of such hearing to be served on the appellant. On the appointed day the motion was heard before the vice-chancellor (who had not been appointed to the duty). Both parties produced their witnesses and presented their arguments; the first objection to the jurisdiction assumed by the vice-chancellor being taken on this appeal. Under these circumstances we think this exception must fall to the ground. It comes too late; the parties having by their acquiescence waived the mistake in question, which must be deemed a mere irregularity, since the chancellor had ratified before objection the procedure by this final decree.

The next and last objection involves the merits of the case. As already stated, this procedure is based on the act to be found in Supp. Revision, p. 834, pl. 42. Its general provision is thus expressed, viz.: "That if any railroad company in this State has or may hereafter fail or neglect to run daily trains on any part of its road for the space of ten days, then the chancellor of this State, upon petition of any citizen of this State, and due proof of the facts, shall speedily appoint a receiver," etc.; and then follows the following clause: "Provided

Appoint-
ment of
receiver—
Railroads at
seaside
resorts.

that this act shall not apply to any railroad company whose road is constructed at any seaside resort, not exceeding four miles in length, and which was built and intended merely for the transportation of summer travellers and tourists. In the present case the appellant has shown, in the clearest manner, that, in point of fact, its road is exactly one of those described in this proviso. It is less than four miles in length; is at a seaside resort; was designed to be and was a mere adjunct of a boat running in the summer season from Philadelphia; and was used merely, except incidentally, for the transportation of "summer travellers and tourists." We think, therefore, that the appellant has, under the evidence, demonstrated that it stands within the definitions of this proviso, provided such proviso applies to roads already in existence at the time of its enactment.

The vice-chancellor was of opinion that this exceptive clause did not apply to the appellant's road, because it was built before the passage of this law, and he declared that he did not feel himself "at liberty to give this provision any retrospective operation."

But this interpretation appears to us to be in plain repugnancy, not only to the spirit, but to the language, of the statute. In its first line this is manifest, for it declares that its summary processes are to apply, not only to roads that thereafter should fail to run their daily trains, but also to roads that had before the passage of the law failed to do so; and the proviso, by its strict terms, is made applicable exclusively to a road which, to use the statutory expressions, "is constructed," and which "was built and intended," etc.; plainly designating, if we look to terms alone, roads already in existence, and not those which might come into existence at a future time. It is further to be remarked that a construction of this act that would limit its operation to railroads built before its passage, and which consequently should withhold its immunities from similar roads subsequently built, would make it, in a very plain manner unconstitutional; as such a law would be special, and not general, for it would obviously not embrace a class. It seems to us that this act is operative on all railroads having the designated characteristics, without reference to the time of their construction. To this extent the contention of the appellant must prevail.

**Application
of statute
to roads
already
built.**

But the principal objection against the appellant's case, in the mind of the vice-chancellor, appears to have been that it was estopped, by the form of its application for incorporation under the general railroad law, from setting up that it was built for the special purpose of carrying summer travellers to a seaside resort. The judicial language upon this subject is: "The law declared the conditions upon which they should or could build a railroad. In form, and in such articles as the law prescribes, these corporators

accepted the conditions, and declared their intentions, which were in harmony with the conditions;" and the inference is drawn that such "solemn obligations" are binding on the corporation.

Effect of incorporation under general railroad law. The theory seems to be that, as the appellant originally accepted a charter which, by force of its terms and existing legal principles, compelled it to run trains at all seasons, it is not competent for it now to maintain that it need run its trains only in the summer time.

It will be observed at once that if this position be tenable the proviso in the act of 1880 becomes a dead letter, as there would be no subject for it to operate upon; for every railroad that now exists, or that may hereafter exist, stands, or will stand, pledged, so far as relates to the language of its charter, to run its trains, not at particular seasons, but at all times. Such, undoubtedly, are the obligations assumed on the part of these companies by the form of their respective charters, whether specially incorporated, or organized under the general railroad act; and consequently if, on account of such an obligation, the present appellant cannot claim the dispensations of the proviso in question, neither can any other of these corporate bodies make such claim; the result being that such proviso would be left without operative force. The fallacy of the rule adopted arises from the fact that this appellant was regarded as having deliberately assumed a public duty, and as now attempting to modify and limit such duty, leaving out of the account the vital circumstance that the legislative authority sanctioned such action. Granting that the appellant, by the act of becoming incorporated, solemnly agreed with the public to run its trains every day in the year, and that the legislature subsequently released it of a portion of such duty, it does not seem questionable that such a remission would be legal. The obligation to run trains being due to the public, it was plainly competent for the legislature to surrender or release it in whole or in part. The appellant, therefore, could consistently resort to the proviso in question for its protection.

But it was argued, and the position appears to have been favored by the vice-chancellor, that this proviso was void, inasmuch as it

Special laws conferring corporate privileges. was a special law conferring corporate privileges,—a form of legislation forbidden by the constitution of this State. In approaching this enquiry, it is proper to premise that to sustain this proposition would be in effect to lay a ground for the dismissal of the petition in this case that seeks the appointment of a receiver;

for, if this proviso is not sustainable, the body of the act must fall with it, as the one cannot be separated from the other without a perversion of the legislative design. Looking at the complete act, we find a purpose not to extend its requirements to a certain class of railroads, and if we suppress the proviso, in violation of

such expressed purpose, we extend it to such excepted class. Manifestly, therefore, the proviso cannot be suppressed, and the residue of the act retained and enforced in its mutilated condition. Consequently, when the conclusion was reached in the court below that the proviso was in conflict with the constitution, the application for a receivership should have been refused on the ground that the entire proceeding was destitute of all statutory bases. But in the opinion of this court the statutory clause thus challenged is not to be invalidated on constitutional grounds. The regulation established by it constitutes, on well-settled principles, a general, and not a special, law, as the objects of it form a distinct class, and the legislation in question appertains to the characteristics on which such classification rests. These inconsiderable roads, which are mere appendages to seaside resorts, and which cannot be run with essential advantage, in view of either public or private interest, except during short periods of the year, differ materially from the ordinary railroads of the State that have been established as the perpetual highways of travel and commerce. The difference between these two groups of instrumentalities is so marked that it is obvious that they cannot be subjected to the same public rule, for a regulation requiring one set of them to be operated without cessation would be not only reasonable, but absolutely necessary for the welfare of the community, while in its application to the other set it would bring about a mere waste and destruction of private property. We think, therefore, that these seaside roads stands sufficiently aloof for the purposes of legislative classification and particular regulation. Nor does it appear to us that it was legally objectionable for the legislature to constitute this special class by a reference to the length of the roads for the purpose of classification. The roads could be grouped in no other way, and, looking at the definition of the objects to which this proviso is to be applied, we cannot say that it is either too broad or too narrow; for it appears to embrace the whole of the class to which it properly relates, and nothing more. The result is that the proviso should have been held to shield the appellant from this entire procedure.

Let the decree be reversed, and the petition dismissed. Unanimously reversed.

LAKE SHORE AND MICHIGAN SOUTHERN R. CO.

v.

CINCINNATI, WABASH AND MICHIGAN R. CO.

(Indiana Supreme Court, December 19, 1889.)

Eminent Domain—Railroad Crossing—Effort to Agree.—Under the provision of the Indiana statute authorizing a railroad company to cross the track of another railroad and providing that "if the two corporations cannot agree upon the amount of compensation to be made therefor, or the points or manner of such crossing and connections, the same shall be ascertained" by commissioners, it is essential that there should have been an effort made by the companies to agree, not only as to compensation, but also as to the point or manner of crossing, and a petition for the condemnation of right of way must allege a compliance with the statute in all these respects.

Same—Pleading—Averment.—An averment in proceedings for condemnation of right of way across another railroad that, "having attempted and being unable to agree with the respondent in regard to the terms of, or in regard to the compensation therefor," the company did take the right of way, etc., is not an averment that the company condemning the right of way attempted to agree as to the point or manner of crossing.

Same—Waiver of Right.—If objections are seasonably and appropriately made in proceedings for the condemnation of lands that the company failed to make the necessary attempt to acquire right of way by agreement, there is no room for the presumption that the land owner has waived such effort to agree.

APPEAL from Circuit Court, Elkhart County.

Proceedings by the Cincinnati, Wabash & Michigan R. Co. to condemn right of way across and along the track of the Lake Shore & Michigan Southern R. Co. An order was granted condemning the right of way, and the latter company appealed therefrom.

Jos. A. S. Mitchell and *O. G. Getzen-Danner* for appellant.
Cowgill, Shively & Cowgill for appellee.

ELLIOTT, J.—The first question, presented in various methods, which we are required to decide, is this: What must be done by a railroad company engaged in constructing a new road to entitle it, as of right, to build its track across the road of a company previously built? There is no doubt as to the right of one railroad company, upon the payment of compensation, to construct its road across that of another road already in existence; but the terms and conditions upon which it can be done are such as the law prescribes. Lewis, Em. Dom., § 268.

A condition precedent to the right to cross is a compliance with the statutes. The road seeking the right to cross another must

**Eminent
domain—
Power to
cross rail-
road track.**

affirmatively show that it has performed the acts which the statute requires. In a recent work, the law upon this subject is thus stated: "The petition should comply with the statute in all respects, and should contain all the facts necessary to give jurisdiction." Lewis, Em. Dom. § 348. Further on in the same section the author says: "The allegations of the petition should be certain and positive. But where the allegations were followed by the phrase 'as we believe,' they were held to be sufficiently positive. If the statute requires the petition to contain a particular statement, its omission will be fatal." The general rule is that material matters must always be directly alleged, and not stated by way of recital; and there is no reason why the rule should not apply to such cases as this. *School Tp. v. Farlow*, 75 Ind. 118; *Shafer v. Mining Co.*, 4 Cal. 294; *Hall v. Williams*, 13 Minn. 260. It is therefore necessary in such cases as this to ascertain—First, what facts must be stated; and, second, whether they are positively stated, or merely stated by way of recital.

Same—Ful-
filment of
condition
precedent.

The contention of counsel upon the particular question stated narrows the enquiry; for, as we understand the argument, the only point in which the petition or instrument of apportionment is asserted to be defective is in the failure to aver that the two corporations cannot agree upon the amount of compensation to be made therefor, or the points or manner of such crossing. The statute which governs contains this provision: "And if the two corporations cannot agree upon the amount of compensation to be made therefor, or the points or manner of such crossings and connections, the same shall be ascertained and determined by commissioners." Rev. St. 1881, § 3903, subd. 6. It seems clear to us that this provision is not to be restricted to the single element or compensation, but that it must be construed as embracing also questions concerning the location and method of constructing the crossing. The language is not ambiguous, and it certainly embraces three very different and very material things,—compensation, the point of crossing, and manner of crossing. We cannot see how it is possible, looking solely to the words of the statute, to hold that all it refers to is the matter of compensation, since to reach such a conclusion many strong and clear words must be rejected. The language is plain; but plain as it is, we think it not more plain than the object the legislature intended to accomplish. It is very evident that the legislature did not mean to invest the younger company with power to cross at any point, and in any mode it might elect, but that, on the contrary, it meant to prevent the arbitrary exercise of the right to cross the older line. The purpose was to give both corporations an opportunity to agree, if they could, as to the com-

Effort to
agree as to
compensa-
tion and
point and
manner of
crossing.

pensation, the point of crossing, and the mode in which the crossing should be constructed. It was the intention of the legislature to prevent the arbitrary exercise of power by either

Intention of statute. the senior or the junior corporation, and to compel them to negotiate concerning the crossing, or, if the senior refused, to enable the junior to bring the matter before the court for consideration and judgment upon the three elements involved,—the compensation, the point of crossing, and the mode of conducting the one line across the other. This must be the interpretation of the statute, otherwise we must reject many words as meaningless, and disregard the appropriately expressed intention of the legislature. This result must be averted, for a firmly settled rule of law declares that no word or clause in a statute shall be regarded as meaningless or superfluous, if it can be avoided. But there is much reason and justice in the statute as it is written, for although it is just that the older company should not be allowed to arbitrarily dictate terms to the younger, it is equally just that the younger should not be allowed to make a crossing regardless of the rights of the older company. Our conclusion is that the negotiations which the statute requires the two corporations to conduct are negotiations concerning the three things we have enumerated, and that if these three things cannot be settled by negotiation they must be brought before the appropriate tribunal for adjudication.

The instrument of appropriation does not aver in positive terms that there was any failure to agree even as to the element of compensation, for all that is alleged on the subject is thus pleaded:

Averments in instrument of appropriation. "Having located the line and route of its said proposed extension of road over the land and premises herein after described; and having attempted and failed, and being unable to agree with respondent in regard to the terms of, or in regard to the compensation therefor," the plaintiff did take and appropriate said

way. The allegations as to compensation seem to be made only by way of recital, and are therefore probably insufficient; but, however this may be, there is certainly no allegation at all as to the other elements,—the point of crossing and the mode of conducting the one line of railroad across the other. The petition does not, therefore, show any attempt to bring about an agreement upon the points required by the statute, for two, at least, of the essential points are not mentioned. For this reason we think the petition or instrument of appropriation is insufficient.

It is defective not simply in form, but in substance. It is defective in substance, because it fails to show an attempt to secure the agreement for which the statute provides. This defect is far-reaching; for if the questions as to the point of crossing and the mode of constructing the crossing are not brought before the

court, the senior corporation is practically denied the right to have two very important questions litigated and adjudicated. These two questions may, it is easy to conceive, often be of much more importance than the question of compensation. If the questions as to the place of crossing and the manner of making it are not the subject of judicial investigation, then it must be true that these are matters to be settled by one alone of the two corporations, and this would be plainly unjust, since the rights of both are directly involved and the rights of both vitally affected. It is not equitable that either the senior or the junior corporation should be at unrestrained liberty to dictate terms to the other. Equity and justice require that both should be heard in the matter, and if no agreement can be effected, then that the courts, with both parties before them, in due course of law, should adjust the dispute with due regards to the rights of each.

It is proper for courts to have regard to consequences in giving effect to statutes. They cannot, to be sure, disregard the plain words of the statute; but it is nevertheless their duty, whenever it can be done without violence to the language employed, to so construe statutes as to give them a reasonable, just, and beneficial effect. This doctrine has been repeatedly stated by the highest of the national courts, and has been acted upon by our own court.

**Rule of
construction
of statute.**

U. S. v. Kirby, 7 Wall. 482; *Charles River Bridge v. Warren Bridge*, 11 Pet. 420; *Rodman v. Reynolds*, 114 Ind. 148; *Humphries v. Davis*, 100 Ind. 274.

The doctrine is, as every one knows, much older than any American court. *Broom*, Leg. Max. 184; *Ram*, Judgm. 113. We do not, of course, assert that the judiciary will determine matters of policy or expediency, for we broadly concede that those are purely legislative questions; but we do assert that the judiciary will, where it can be done without departing from the words of a statute, give the statute such a construction as will avert evil or unjust results. Here, however, the language of the statute suggests and develops the policy which is obviously the just one, and we need do no more than give a fair and reasonable effect to those words.

It appears from the record that the appellant was called upon to agree as to the matter of compensation only, and that the course pursued was such as not to bring forward for consideration the two other elements involved,—the place of crossing and the manner of crossing,—but to exclude them. The position of the appellee, as indicated by the record and the method of pleading, was that only the matter of compensation was to be agreed upon, and that the two other elements were not the subjects of negotiation and agreement. No other effect can be attributed to the allega-

**Nature of
effort to
agree.**

tions as they appear of record, since it confined, so far as it was in appellee's power, the questions to the single one of compensation, thus, impliedly, at least, affirming that the others were not the subject of negotiation. As it required the appellant to negotiate upon one only of three questions, it did not make such an effort to secure an agreement as the law requires. The appellant was not bound to enter upon negotiations on a false basis, and by restricting the negotiations to a single question the appellee wrongfully endeavored to draw it into negotiations upon a false basis, thus disobeying the law and rendering the proceedings ineffective.

The conclusion which we have reached is, in our judgment, maintainable on reason, without the aid of authorities, but authorities are not wanting. The rule we approve is thus stated by Mr. Lewis: "Statutes conferring the power of eminent domain usually require that an attempt shall be made to agree with the owner of property desired before instituting proceedings to condemn it. In whatever form of words this direction is couched, it is generally held to be imperative, and a condition precedent to the exercise of compulsory powers. It is generally held that the inability to agree should be alleged and proven." Lewis, Em. Dom. § 301.

Very many cases are collected and cited in support of the text. We are aware of the decision in *Swiney v. Ft. Wayne, M. & C. R., Co.*, 59 Ind. 205, that is not necessary for a railroad company seeking to appropriate land to precede its application to condemn by

**Relevancy
of authori-
ties cited.**

an offer to purchase; but conceding, for the present, the soundness of that decision, and postponing the examination of it until we dispose of the point under immediate mention, we affirm that it has no application to this point, and that is sufficient at this place, except, perhaps, that we ought to give our reason for denying its relevancy, and that we do by affirming that the statute which rules this point does imperatively require that there shall be a precedent effort to adjust the disputed questions by an agreement. We know, too, that in *Ney v. Swinney*, 36 Ind. 454, it was decided that the fact there was a precedent effort to secure an agreement was not a jurisdictional one; and, without now questioning the correctness of that ruling, we dispose of the case as we did *Swinney v. Ft. Wayne, M. & C. R. Co.*, by denying its relevancy. We may with strict propriety add another reason, and that is this: In the case cited the question came before the court in a collateral proceeding, while here it is presented by an appropriate direct attack; so that here the question is not entirely one of jurisdiction, as in *Ney v. Swinney* it certainly was.

The authorities, with little, if any, conflict, sustain us in affirming, as we have done, that it must be affirmatively shown that an

effort was made to secure such an agreement as the statute requires. It is not enough to show, even by direct averment, that there was an effort to obtain some agreement, but it must be shown that the effort was to obtain the agreement which the statute prescribes. The statute of New York is the same as ours, and the rule which prevails there is thus stated in one case: "The petitioner had no right to resort to the court until a failure to agree as to the matter specified. Such failure was a condition precedent to any standing in the court, and there could be no failure or inability to agree, within the meaning of the statute, until some efforts to agree had in good faith been made." *In re Lockport & B. R. Co.*, 77 N. Y. 557, 563. In another case it was said: "It is a fatal objection to the order in these proceedings, so far as the rights of the Troy & Bennington Railroad are involved, that the petition does not show that any attempt has been made to agree with that company as to the points or manner of crossing its road, or the compensation to be made therefor. This is a jurisdictional fact. The attempt and failure to agree is a condition precedent to the authority of the court to appoint commissioners, and unless this is averred in the petition there is no jurisdiction." *In re Boston, H. T. etc. R. Co.*, 79 N. Y. 69. The same case also contains this statement: "The very purpose of providing for the appointment of these commissioners is to determine, in case of dispute, at what points and in what manner the crossings shall be made; and it is the obvious duty of these commissioners to see that the crossings are not made in such a manner as to unnecessarily interfere with the operation of the road." The decided cases go further than we are required to do here, for they hold that the failure to agree must appear in order to give jurisdiction. The rule is thus stated by a text writer: "The record of the preliminary proceedings should affirmatively show a failure to agree. The refusal of the owner is a jurisdictional fact, and is not to be eked out by extraneous evidence." Mills, Em. Dom. § 107. We do not deem it necessary to cite the cases, and content ourselves with affirming that they are very numerous and unusually harmonious.

We cannot assent to the proposition of appellee's counsel that the instrument of appropriation sufficiently avers that there was an effort to agree as to the point and manner of crossing. What is averred as to compensation cannot justly be held to be well alleged, since it seems to us that it is stated only by way of recital; but, for the present, waiving this point, and granting that the allegation is not simply a recital, we are compelled to hold that there is no sufficient averment at all upon any other question except that of compensation. Counsel say: "By the word 'terms' we meant the conditions upon which such crossing might

Rule deducible from authorities.

Averments of instrument of appropriation not sufficient.

be had, referring to those not only of point and of place, but to the conditions also that must be included in the word 'manner' as used in the statute."

We have given the subject much study, and have endeavored to give the pleading the construction for which counsel contend, but this we cannot do. The word "terms" cannot be extended as counsel insist. Certainly it cannot be construed to mean place of crossing, nor do we think it can be construed to mean the manner of constructing the crossing. In strictness, the word "terms" refers only to the compensation, for this is the fair construction of the whole averment. It reads, and we repeat it for the sake of clearness: "And having attempted, and being unable to agree with the respondent in regard to the terms of, or in regard to the compensation therefor, do now, by these presents, under and pursuant to the provisions and requirement of the act of the general assembly, take and appropriate an easement in, and the right to use, the lands and premises held by the respondent as aforesaid, for the purpose of constructing, owning, and operating in perpetuity, its, the said petitioner's, railway over, across, and upon the same." It is manifest that the word "terms" cannot be so stretched as to include the three things,—compensation, place of crossing, and the mode or manner of crossing,—without doing violence to the word and to those words with which it is associated. At all events, there is not that directness and definiteness in averring the material and indispensable facts which the law requires.

As we have already said, the question here is not solely one of jurisdiction, for here we have a direct attack, and the sufficiency of a pleading appropriately questioned. We are therefore confronted with the question whether sufficient facts are pleaded, and whether they are well averred. The questions before us cannot, it is clear, be disposed of by asserting that they are not jurisdictional. If it should be conceded that they were not jurisdictional, we should still be compelled to decide whether facts sufficient were well pleaded. The case of *Borland v. Mississippi & M. R. Co.*, 8 Iowa 148, may consequently be conceded to be well decided, and yet be justly declared to be not of governing or even of persuasive force. Its revelancy, on the contrary, must be explicitly denied.

It is not to be forgotten that in directly assailing a pleading only such facts as are sufficiently pleaded are admitted. A fact not well pleaded adds no strength to the pleading. This is proved by the authorities, and results from an old rule which has for ages passed unchallenged.

We agree with the appellee's counsel that the inability to agree is the thing required; but we must add to their proposition

**Question is
whether
facts
sufficient
were well
pleaded.**

that the thing 'required is the inability to agree upon the three things named in the statute. The agreement, if successful, or, if unsuccessful, the effort to agree, must extend to all of the material things of which the statute makes mention. Counsel cite us to *Burt v. Brigham*, 117 Mass. 307; *Tucker v. Erie etc. R. Co.*, 27 Pa. St. 281; *Mississippi & M. R. Co. v. Rosseau*, 8 Iowa 373; *U. S. v. Reed*, 56 Mo. 565; *Booker v. Venice & C. R. Co.*, 101 Ill. 333; 5 *Arh. & Eng. R. R. Cas.* 357. But we do not regard these authorities as decisive of the question. Indeed, we do not think they meet the question as it comes to us. We have not gone counter to them, for we agree with them in the main, and hold that all that is required is the fact of the inability to agree; but where we differ from the counsel is in holding that the inability to agree is not sufficient unless it appears that the effort to secure an agreement extended to all of the things specified by the law, and that it must be well pleaded. To be well pleaded the facts must be so averred that a definite issue can be evoked. It is here that the views of court and counsel diverge, and it is because they thus diverge that the authorities cited do not control our judgment. They are not broad enough to meet the whole question, but leave much of it, and a material part of it, utterly unsupported.

Effort to agree must extend to all material things.

There may, we doubt not, be a waiver of an agreement or of an effort to agree, but where there is a waiver that fact should be directly alleged. This certainly is in accordance with the long and well settled rules which prevail in ordinary cases. But, passing without deciding this precise question, we hold that where objections are seasonably and appropriately made there can be no waiver. So the objections were made in this case. We cannot conceive how there can be a waiver where an objection is appropriately made at the earliest opportunity to a petition or to an instrument of appropriation. We do not believe that the waiver of a material right in the nature of a condition cannot be presumed or inferred. Neither do we believe that an appeal which invokes the powers of the court is of itself a waiver of any valid objection to the proceedings. If it were so, then, in no case where an appeal is taken, would there ever be any other question open to investigation than that of compensation. It is our conviction that the law never meant to thus limit the judicial investigation invoked by the appeal. Parties, doubtless, may limit it, but it is not to be presumed that they have done so in the absence of facts creating the presumption. The language used by Mr. Mills, in the section counsel referred to, is not entirely accurate, but his meaning is not that attributed to him by counsel, for it is quite apparent that he refers to cases where the record shows

Waiver of effort to agree.

that the only point in issue was that of compensation. Mills, Em. Dom. § 109. So far as concerns the waiver of all efforts to agree, it is clear that this author refers only to cases where the record shows that there was a waiver. Id. § 108.

Counsel have argued a question of much more importance and difficulty than these we have decided, and that question is whether, upon a proper instrument of appropriation, a junior corporation can condemn part of the right of way of an existing railroad company, and by this means acquire a longitudinal part of the right of way? On the one hand it is affirmed that subdivision 5, § 3903, Rev. St. 1881, confers the power to condemn, while, on the other, it is contended with earnestness, and with no little plausibility, that the statute confers authority to condemn only for the purpose of intersecting, connecting, or crossing. Both sides agree that property once appropriated can not be again condemned unless the statute confers that power; but the appellee's counsel vigorously and ably argue that the statute does confer this power, and that, under it, part of the right of way of the older corporation may be condemned, and a line of road laid parallel with the existing track. We have not decided this question for the reason that, in our judgment, we first encounter a question which is decisive of this appeal. We think it not inappropriate, however, to cite the authorities which are at hand, for the question is one that will probably require decision in some other case: *Baltimore & O. R. Co. v. North*, 103 Ind. 486; 23 Am. & Eng. R. R. Cas. 36; *Hickok v. Hine*, 23 Ohio St. 523; *Pittsburgh Junction Co.'s Appeal*, 28 Am. & Eng. R. R. Cas. 266; *Illinois Cent. R. Co. v. Chicago, B. & N. R. Co.*, 30 Am. & Eng. R. R. Cas. 287; *Denver & R. G. R. Co. v. Denver & S. P. R. Co.*, 14 Am. & Eng. R. R. Cas. 83; *Duncan v. Pennsylvania R. Co.*, 94 Pa. St. 435; 7 Am. & Eng. R. R. Cas. 1; *In re Boston & Alb. R. Co.*, 53 N. Y. 577; *State v. Montclair R. Co.*, 35 N. J. Law 328; *Alexandria & F. R. Co. v. Alexandria & W. R. Co.*, 75 Va. 780, 10 Am. & Eng. R. R. Cas. 23; 40 Am. Rep. 743, and note; *Boston & M. R. v. Lowell & L. R. Co.*, 124 Mass. 368; *Contra Costa R. Co. v. Moss*, 23 Cal. 330; *Thomas v. West Jersey R. Co.*, 101 U. S. 71; *Clinton v. Cedar Rapids & M. R. Co.*, 24 Iowa 455; *Attorney General v. Eli, H. & S. R. Co.*, L. R., 4 Ch. 194.

The gravity and importance of the question is such that we have concluded that it should only be decided in a case where it is indispensably necessary to a proper and adequate judgment. We do not, as we have indicated, believe this is such a case, for we think that our decision upon a point which precedes the one mentioned fully and properly disposes of this appeal. We believe our duty is done

Power of junior corporation to condemn longitudinal part of right of way.

Question not considered.

when we fully meet and decide a question which leads to a reversal, without investigating and deciding questions which lie beyond. Where a material question first in point of priority is decided, all the questions that the record legitimately brings to us are disposed of within the meaning of section 5 of article 7 of our constitution. That provision cannot mean that in cases of reversal every point must be decided, even though some one of them completely disposes of the case; nor does it mean that the court must write upon all questions, but that it must write on such only as are decided. This court has uniformly acted upon the rule that where there is a judgment of reversal it will not consider all of the questions urged or presented, except in cases where it is clear that they will arise on a new trial, and even then the questions are not decided because it is the duty of the court to decide them, but because it is best to do so, as a matter of expediency. We doubt whether a single volume of our reports can be found, from the time our constitution went into effect until the present, which does not contain cases in which this rule was acted upon by the court. Questions which come after a pivotal one that controls the case, and the decision of which completely disposes of the appeal, cannot, as a general rule, be accurately said to be presented by the record in cases of reversal, although there may be, and perhaps are, exceptional cases. If it were otherwise the court might often be required to go far beyond the decision of a question which disposes, adequately and properly, of a pending appeal; and we think it evident that only such questions as must be decided in order to justly and completely dispose of the case before the court can be said to be "questions arising on the record," and questions on which the court must write. If, to sum up in a short way, the court decides all the questions essential to a full and effectual disposition of the case, at its bar, and writes on those questions, it has done its full duty under the constitution. *Trayser v. Trustees, etc.*, 39 Ind. 556; *Willeys v. Ridgway*, 9 Ind. 367.

We do not deem it necessary to a final disposition of this appeal to decide whether a junior corporation can, in any event, seize the right of way of a senior corporation, for the reason that we are satisfied that, conceding that the power to appropriate does exist in the junior corporation, that power cannot be exercised until after there has been a fruitless effort to come to an agreement. There must, in our judgment, be an attempt to agree; and this, if not strictly a jurisdictional matter, is, at least, a condition precedent to the exercise of the power to appropriate.

We are inclined to the opinion that subdivisions 5 and 6 of section 3903, Rev. St. 1881, must be construed together, and that they must be regarded as containing the only grant of power to one railroad corporation to seize the property of another that

is used for railroad purposes, no matter what may be the character of the property seized or the rights acquired. Illinois Cent. R. Co. v. Chicago B. & N. R. Co., 13 N. E. Rep. 140.

Construction of Indiana statute. Those subdivisions read thus: "Fifth. To construct its road upon or across any stream of water, water-course, road, highway, railroad, or canal, so as not to interfere with the free use of the same, which the route

of its road shall intersect, in such manner as to afford security for life and property; but the corporation shall restore the stream or water-course, road, or highway thus intersected to its former state, or in a sufficient manner not to unnecessarily impair its usefulness or injure its franchises. Sixth. To cross, intersect, join, and unite its railroad with any other railroad before constructed, at any point on its route, and upon the grounds of such other railroad company, with the necessary turnouts, sidings, switches, and other conveniences in furtherance of the objects of its connections; and every company whose railroad is or shall be hereafter intersected by any new railroad shall unite with the owners of such new railroad in forming such intersections and connections, and grant the facilities aforesaid; and if the two corporations cannot agree upon the amount of compensation to be made therefor, or the points or manner of such crossings and connections, the same shall be ascertained and determined by commissioners to be appointed as is provided hereinafter in respect to the taking of lands, but this section is not to affect the rights of franchises heretofore granted."

We do not, however, decide this question; for we think that if the provisions of the statute which refer to the seizure of lands or property owned by individual citizens be alone considered, still the result must be adverse to the appellee and decisive of this appeal. It is obvious that if the construction suggested be the correct one, then the provisions as to the agreement relate to the longitudinal strip as well as to the crossing, and the last clause of sub-section 6 applies only to proceedings subsequent to the effort to agree.

It is our judgment, reached after full deliberation and careful study, that a railroad corporation cannot acquire the property of a citizen, or of another railroad corporation, without having first endeavored to secure it by agreement. This is so, even though the statute applicable to the acquisition of property from individuals be alone considered as supplying the governing rule; and more clearly it is so, if possible, where the provisions of the statute we have copied, (subdivisions 5 and 6,) are taken as furnishing the rule of decision; since it is evident from what we have said that an agreement, or an effort to secure an agreement, upon the three matters designated is a con-

Company cannot condemn without effort to agree.

dition precedent in all cases where there are no facts constituting a waiver. Many of the arguments, and many of the authorities we have already adduced, support and confirm our conclusion.

We are at this point necessarily required to examine with care the case of *Swinney v. Ft. Wayne, M. & C. R. Co.*, *supra*. Our duty is the less delicate for the reason that the court has already declared its disapproval of the decision in that case.

This was its declaration in the case of *Terre Haute & I. R. Co. v. Scott*, 74 Ind. 29; 3 Am. & Eng. R. R. Cas. 208. The opinion in *Swinney v. Ft. Wayne, M. & C. R. Co.*, upon the point here under immediate discussion, was not, it is evident, very carefully considered.

Swinney v. Terre Haute & I. R. Co. overruled.

for all that was said, is this: "We think the court did not err in rejecting the first exception to the award. It is not necessary that the appellant should have offered to purchase the land before commencing proceedings to appropriate it. There are decisions in other States, however, which hold such an exception good; but upon examination we find that they rest upon statutes which allow the appropriation to be made by a legal proceeding only upon the refusal of the land owner to convey upon application of the company desiring to obtain the lands." It is impossible for us to resist the conviction that the court did not accurately construe our statute. We are forced to the conclusion that the legislature intended to require that an effort should first be made to procure the property by agreement. This intention is manifested by appropriate words, and is evident from an inspection of the entire statute. It is, as we adjudge, clearly manifested in several clauses of section 3907, one of which reads as follows: "If the corporation shall not agree with the owner of the land, or with his guardian, if the owner be incapable of contracting, touching the damages sustained by such appropriation, such corporation shall deliver to such owner or guardian, if within the county, a copy of such instrument of appropriation." We can perceive no reason for affirming that this clause, in itself, does not imply that before seizure there must be some effort to secure the property by agreement. The thing to be first done is to secure the property by contract, and then, if this effort is unavailing, proceed to acquire the property by condemnation. We believe, also, that the court, in the case we are criticising, overlooked the policy which our legislature, influenced, it is just to presume, by the legislation of other States, intended to establish. More remains to be said on this point, and that, in brief, is this: The general policy of the law is not to take by force of law that which may be acquired by contract. It is no more than just that a property owner should be given an opportunity to sell his property, or refuse to sell it, before asking the aid of the law to take it from him. It is, it needs no argument to demonstrate, bare justice to award a prop-

erty owner an opportunity to reject or accept before forcing him, by legal proceedings, to give up his property. If, without doing violence to the words of the statute, a wise and just policy can be established, it is the duty of the courts to so interpret the statute as to establish that policy. A construction which will overturn a salutary policy or work injustice is, if possible, to be avoided. Mr. Bishop says: "The interpretation should lean strongly to avoid absurd consequences, injustice, and even great inconvenience; for the legislative meaning is to be carried out, and it cannot be supposed to be any of these." Writ. Law, § 82. We regard it as clear that the legislature did not mean to take by force of law the property of a citizen or corporation and bestow it upon another without first giving him an opportunity to part with it by agreement, or to refuse to part with it. The power of eminent domain, guarded as carefully as it can be, is a very high and dangerous one, and no restriction which tends to the better protection of the owner whose property is taken against his will should be swept away by the courts, except in cases where the language of the statute is so clear as to leave nothing for the courts to do but give effect to its very words. We do not mean, of course, that courts can substitute their judgment for that of the legislature, or that they can disregard the words of the statute. We are very far, indeed, from sanctioning any such doctrine, for we have again and again declared that the courts cannot determine questions of expediency or policy; but we do mean that where the meaning of the statute is not clear, the courts will so construe it as to promote equity and justice. No equitable consideration alone can, we affirm, authorize a court to disregard the language of an unambiguous statute, but equitable considerations, where they may be presumed to have influenced legislative action, and where the words are not clear, are entitled to high consideration from the courts, since it cannot be presumed that the legislature intended to violate the principles of natural justice. If there is doubt it will be resolved in favor of the presumption that the legislature meant to do equity. Natural equity will not control the words of a statute where there is no uncertainty. However evil may be the results which will flow from an adherence to the words, no departure is possible where there is certainty; but, where there is doubt, that construction will be adopted which will prevent injustice. We accept as substantially an accurate statement of the general rule what is said in a recent work: "If the words of a statute, though capable of an interpretation which would work manifest injustice, can possibly, within the bounds of grammatical construction and reasonable interpretation, be otherwise construed, the court ought not to attribute to the legislature an intention to do what is a clear, manifest, and gross injustice. On the contrary, the presumption always is, where the design of an act is

not plainly apparent, that the legislature intended the most reasonable and beneficial interpretation to be placed upon it. It is obvious that the administration of justice requires something more than the mere application of the letter of the law." End. Interp. St. § 253.

It is consistent with justice, and in harmony with the presumed intention of the legislature, to hold, as we do, that it was the purpose of this statute to afford the property owner, whether an artificial or a natural person, the opportunity of disposing of his or its own property by agreement, or of declining to do so before taking it against the owner's will by force of law. It is indeed implied in the very fact that the law must ultimately be resorted to that it is taken without the owner's consent, but before resort is had to the law the owner should be heard to decline or agree to part with the property by contract.

The decisions in the class of cases to which the case at bar and the one we are criticising belong, strikingly illustrate and enforce the rule we sanction; for it is universally held that in favor of the property owner the construction is liberal, but strict as against the corporation that asserts a right to appropriate his property. "An act of this sort," said the court, in *Binney's case*, 2 Bland, 99, "deserves no favor. To construe it liberally would be sinning against the rights of property." We are thus led to the conclusion that the court in *Swinney v. Ft. Wayne, M. & C. R. Co.*, *supra*, not only so construed the statute as to make it hostile to the general policy of the law, but that it also acted upon a wrong theory, since it construed the statute strictly against the property owner, and liberally in favor of the person seeking to take his property from him.

Construction of statutes delegating power of eminent domain.

We cannot comment upon the numerous cases we have examined, but must be content with asserting that the general rule deducible from them is that, whatever the form of the words employed, a direction that there shall be an effort to purchase the property, or an effort to procure an agreement, will be deemed mandatory, and that the appropriation proceedings will fail unless the statutory requirement is obeyed by making the proper effort before prosecuting proceedings to condemn. *Stone v.*

Provision requiring effort to agree is mandatory.

Commercial R. Co., 4 Mylne & C. 122; *Bowman v. Venice & C. R. Co.*, 102 Ill. 459; 14 Am. & Eng. R. R. Cas. 338; *Chicago & M. L. S. R. Co. v. Sanford*, 23 Mich. 418; *Cunningham v. Pacific R. Co.*, 61 Mo. 33; *Hannibal, etc. R. Co. v. Muder*, 49 Mo. 165; *In re New York Cent., etc. R. Co.*, 67 Barb. 426; *Pierce, R. R.* 181, and cases cited in note; *Lewis, Em. Dom.* § 301, and authorities collected in notes 1 and 2. We are constrained by the considerations we have expressed, and the authorities we have

examined, to deny the authority of *Swinney v. Ft. Wayne, M. & C. R. Co.*, *supra*, upon the point we have discussed, and to acquiesce in the disapproval expressed in the case of *Terre Haute & I. R. Co. v. Scott*, *supra*.

The instrument of appropriation is the foundation of the entire proceeding. If it be not a sound foundation, no valid proceedings

can be built upon it. A sufficient foundation it can not be, unless it states all facts essential to the right of the corporation to make the seizure. If it fails to do this, it does not state a case authorizing the court to proceed in the matter. In *Church v. Grand Rapids & I. R. Co.*, 70 Ind. 161; 3 Am. & Eng. R. R. Cas. 198; a case of the same general class to which the present belongs, it was held that the petition must state all facts essential to the right of the court to assume authority over the proceedings, and it was said that "objection may be taken as in ordinary adversary proceedings."

The court said, in another case of the same general nature, that "appellee did not charge, except inferentially, that appellant had taken any of his real estate," and this was held to be a fatal defect. It was also held in that case that a failure to give a correct description of the property taken, and to refer to the statute which authorized the taking of the land, were defects of such a nature as rendered the petition bad. We do not assert that these cases are directly in point, but we do assert that they bear strongly on the general proposition that in all cases the petition or the instrument of appropriation must contain all such facts as are requisite to the authority of the court to proceed in the matter. It is not to be forgotten that the case is not one dependent upon general statutes or general rules of law, but upon a statute affecting the rights of a class, and prescribing particular rules of procedure. Proceedings under such statutes are not ordinary civil actions, but are statutory proceedings of a special nature. *Anderson v. Caldwell*, 91 Ind. 451, and cases cited. *Toledo, A. A. & G. T. Co. v. Dunlap*, 47 Mich. 456; 5 Am. & Eng. R. R. Cas. 378. These special proceedings may be in a general sense civil actions, but they are, nevertheless, proceedings of a peculiar nature, and founded exclusively on a statute; for the right of eminent domain can only be exercised under a legislative enactment, and in accordance with its provisions. Although as to matters of practice and the like the provisions of the civil code may be called to the aid of the special statute, the proceeding is not, in the strict sense, an ordinary civil action. As the proceeding is, in its nature, a special statutory one, it is incumbent on the party who takes the initiatory steps to make a case of which the court may rightfully assume jurisdiction. This must necessarily be so, for there is no inherent or general jurisdiction, but only the special and limited

authority conferred by the statute. To call into exercise this limited and special jurisdiction, facts must be stated authorizing the court to take cognizance of the particular case; and where the question is presented by a direct attack the absence of these facts makes the instrument bad.

It is generally held that the fact of inability to agree is a jurisdictional one; but our judgment is that it is a jurisdictional fact only in a qualified sense, for we believe that, as held in *Ney v. Swinney*, *supra*, the absence of the allegation that there was an effort to agree will not be sufficient cause for declaring the proceedings void in a collateral attack, although the objection, if seasonably and appropriately made, will be fatal in a direct proceeding.

Proceeding
not open to
collateral
attack for
failure to
agree.

We have many cases declaring that where there is some petition, although radically defective, or there is some notice, although insufficient, still, the court having passed upon the petition or notice and adjudged that it possessed jurisdiction, that decision will make a collateral attack unavailing. *Mullikin v. City*, 72 Ind. 161; *Hume v. Conduitt*, 76 Ind. 598; *Rickets v. Spraker*, 77 Ind. 371; *Hackett v. State*, 113 Ind. 532; *Kleyla v. Haskett*, 112 Ind. 515; *Adams v. Harrington*, 114 Ind. 66. The rule, however, is different where the sufficiency of a notice or pleading is directly questioned, and here we are dealing with a pleading directly, seasonably, and appropriately assailed, and it must therefore be held that if it is radically defective the attack should prevail. Our ultimate conclusion is that, even if it be conceded that the authority exists to take longitudinally the appellant's right of way, still this appeal must be sustained, because the instrument of appropriation does not sufficiently plead such facts as authorized the court to proceed in the matter, inasmuch as it does not positively aver that there was an effort to secure, by agreements, the rights demanded.

The construction given to the clause of section 3907, regarding the questions that may be tried on appeal, in *Swinney v. Ft. Wayne, M. & C. R. Co.*, *supra*, we accept as the true one; and we hold, as it was there held, that the clause must be construed to mean "questions subsequent to the establishment of the regularity of the appraisalment." Our conclusion, somewhat differently expressed, is this: The petition or instrument of appropriation must, where the attack is a direct and not a collateral one, show the facts upon which the jurisdiction of the court to move in the case depends, and one of these facts is the effort of the corporation seeking title to acquire it by agreement. This fact, in its nature jurisdictional, must be directly averred; otherwise the instrument does not constitute a sufficient foundation for subsequent proceedings, and is bad as against an attack directly, seasonably, and appropriately made.

Our conclusions necessarily lead to a reversal, irrespective of the question of the right of one railroad company to acquire part of the right of way of an existing corporation.

Judgment reversed.

MITCHELL, J., did not participate in the decision of this case.

Eminent Domain—Delegation of Power—Effort to Agree.—See 6 Am. & Eng. Encyc. of L. 522, 610.

TOWN OF WESTBROOK

v.

NEW YORK, NEW HAVEN AND HARTFORD R. CO.

(*Connecticut Supreme Court of Errors, January 19, 1889.*)

Crossing—Alteration—Petition—Authority.—Under the provision of the Connecticut statute that "the directors of any railroad company whose road crosses or is crossed by a highway, may bring their petition in writing to the railroad commissioners," praying for the alteration of such highway, the directors do not act as the agents of the law, and a petition for a change of a crossing is sufficiently authorized, if authorized by the directors when convened for any purpose, whether with or without special notice, and whether in the State or out of it; and even if unauthorized, the failure of a corporation within a reasonable time after obtaining knowledge of its presentment to object, will amount to a ratification and be sufficient evidence of authority.

Same—Sufficiency of Allegation.—An allegation in a petition that a railroad company "by its directors brought its petition" asking for a change of the crossing of certain highways, is a sufficient allegation that the directors were duly authorized, and that the proceedings were in due form.

Same—Plea in Abatement.—An objection to a petition for the alteration of a grade crossing, that the application was not authorized by the board of directors, and was not in due form, is in the nature of a plea in abatement, which should be presented at the hearing before the commissioners.

Same—Petition—Form—Signature.—A petition which purports to be "the petition of the directors of the N. Y., N. H. & H. R. Co.," and which is signed "The directors of the N. Y., N. H. & H. R. Co., by A. B., their attorney," is a sufficient compliance with a statute authorizing the presentment of a petition by the directors of the railroad company.

Same—Leased Railroad—Owner.—When a railroad is operated by a company under a perpetual lease, it is the road of the lessee, within the meaning of the Connecticut statute for the alteration of grade crossings.

Same—Notice of Petition.—Although the Connecticut statute for the alteration of grade crossings does not require notice of an application to be given to the town when the petition is presented by the directors of the railroad company, such notice is, by implication, necessary.

Same—Constitutional Law—Police Power.—The object of such statute is to remove to certain conditions lawful in themselves, which are a source of danger, and the act is a valid exercise of the police power of the State.

S. L. Warner for appellant.
L. Robinson for appellee.

CARPENTER, J.—Appeal from the doings of the railroad commissioners in the matter of certain grade crossings in the town of Westbrook. There were three applications brought by the railroad company for the purpose of abolishing said grade crossings. They were heard together, practically as one proceeding, and but one order passed. The appeal was heard by the superior court, and a decree passed substantially affirming the order of the railroad commissioners. The town appealed to this court.

Statement
of case.

There are twelve reasons of appeal. The first eight are based on a claim that the applications were not properly brought. The ninth is that the proceedings should have been brought by the lessors, and not the lessees, of the railroad. The tenth is general—that judgment should have been rendered for, and not against the town,—and requires no further notice. The eleventh and twelfth allege that the statute authorizing these proceedings is unconstitutional.

Were the applications authorized, and in due form? We do not see how this question can arise under the pleadings. In the appeal the appellant alleges that “on the 22d day of June, 1887, and on the 5th day of October, 1887, the New York, New Haven & Hartford Railroad Company, by its directors, brought its petitions of the above dates to the board of railroad commissioners of this State asking for a change of the location of certain public highways in said Westbrook, in order to avoid a grade crossing,” etc. The answer admits this allegation to be true. We do not see why that does not effectually end that controversy, unless it is competent for a party to deny or contradict in one part of his pleading what he has affirmed in another, and which has been admitted by the adverse party. Besides, this claim, and every phase of it, is in the nature of a plea in abatement. The order of the commissioners shows that the selectmen of the town were present, and were heard at the hearing before them. They certainly might have interposed this objection as a preliminary one. Being a dilatory plea, which defeats the present proceeding without affecting the merits of the cause, reason would seem to dictate that it should have been interposed *in limine*; thus saving the parties the expense and delay of a nugatory proceeding. But, if this view is too technical, then we think that the appeal should have been taken, partly, at least, on that ground. But the appeal makes no allusion to any want of power in the directors to institute the proceedings, nor to any informality in the process. On the contrary, as we have seen, it alleges affirmatively that the rail-

Authority
to make
application.

road company, by its directors, brought its petitions, etc. That means that the directors were duly authorized, and that the proceedings were in due form. That allegation being admitted, it, and all the facts which it fairly implies, may be regarded as established for the purposes of this case. After alleging the bringing of the petitions by the railroad company, the appeal sets out the final action of the commissioners, which was also admitted, and then proceeds as follows: "The petitioner is aggrieved by the orders, adjudications, and doings of said board of railroad commissioners in respect to the changes ordered to be made in said highways, and the laying out and building of new highways, the method of crossing the track of said railroad by said highways, and the sum of money adjudged to be paid by it to said railroad company, and the other expenses ordered to be incurred by said town." This allegation was denied by the railroad company. Thus the pleadings terminated in an issue involving, in general terms, the merits of the case. The town then filed another paper, which in form seems to be a motion to dismiss all the proceedings, which paper is as follows: "The town of Westbrook, appellant, says that said application ought to be dismissed, and ought not to be granted,

because they say: (1) That the railroad company owning the railroad described in the petition has not made any application for the change of said grade crossings nor have the directors of said railroad signed any such application. (2) That the said grade crossings in said petition mentioned intersect and cross the track of the New Haven & New London Railroad Company, otherwise, in said petition, called the Shore Line Railroad Company; that said company owning said railroad have not signed said application, nor have the directors of said company. (3) That the said pretended application is not signed by the directors of the New York, New Haven & Hartford Railroad Company. (4) That the pretended application was not brought by the directors of the New York, New Haven & Hartford Railroad Company, nor by any person legally qualified so to do. (5) That the object and purpose of said proceeding is to charge the town of Westbrook with the payment of \$5,000 and upwards by virtue of certain pretended statutes of this State, which said statutes and proceedings are unconstitutional and void, in this: that they seek to charge said town, by judgment of this court, with the payment of said sum of money without due process of law, and that said proceeding is not either a legal or equitable proceeding under the constitution of this State, or the United States, and that it deprives the appellants of a right to trial by jury; for all of which reasons they say said pretended application should be dismissed, and they be allowed the costs in this matter unjustly suffered."

The railroad company answered the above as follows: "(1) As

to so much of paragraphs one and two as alleges that the grade crossings are upon the railroad of the Shore Line Railroad Company, and that the application is not brought by said last named company, the appellees say that said railroad is leased to the New York, New Haven & Hartford Railroad Company, perpetually from 1874, and is operated and controlled only by said last named company and its directors, and is the road of said last named company, within the meaning of section 3489 of the general statutes. (2) Paragraphs three and four and five are denied." The appellant, in its reply, admits the lease, but denies that it authorizes the lessee to institute these proceedings.

**Railroad
company's
answer.**

Thus there are in form two distinct sets of pleadings in one cause, which, on its face, is somewhat singular. It is evident, however, that counsel and the court below treated the latter as an amplification of the former, and as included therein. Thus considered, the pleadings raise the three questions presented by the reasons of appeal. The first question, relating to the authority for and the manner of bringing the suit, we have already considered in one aspect of it. We will now notice it in another. Passing from the technical view, and considering the matter on its merits, it will be convenient to divide the question thus: Did the directors legally decide to bring these applications? and were they brought in proper form.

In considering the first question, let us guard against any misconception as to the capacity in which they acted. It is earnestly contended that the statute contemplates their action only as a board, and that they acted solely as the agents of the law; that they could only act when convened as a board, upon due notice to each member, specifying the object of the meeting. This is a mistaken view. The State discharges its governmental duties to the travelling public in respect to ordinary highways by requiring towns to make and maintain them in good condition, and reasonably safe. When steam came to be used for the transportation of passengers and freight on land, a different kind of highway was required. There are dangers attending that method of travelling which the law guards against as far as possible. The crossing of these two kinds of roads at the same grade created a new and formidable danger. At first the amount of business was relatively small, and it was not deemed advisable to incur the expense necessary to abolish grade crossings. But now business and population have increased to such an extent that it has become the policy of the law to abolish all grade crossings, and thereby abolish the danger. The State has not yet undertaken to pay any portion of the expense. As the two roads combine to cause the danger, the State says that those whose duty

**Application
need not be
authorized
'at board
meeting
convened on
due notice.**

it is to maintain the roads shall unite in removing it. It has established a tribunal to determine when and in what manner it shall be done, and to apportion the expense. To insure action, it has provided that the selectmen of any town, the mayor and common council of any city, or the warden and burgesses of any borough on the one hand, and the directors of any railroad on the other, may invoke the action of this tribunal. If neither party moves, the commissioners may act to a limited extent of their own motion. Obviously, these officials severally represent and act for the corporation of which they are agents. There is no reason for saying that they represent the State and are agents of the law. The corporations, and not the agents, are the real parties, and the expense is borne by them, and not by the officials. It follows that any action by the directors which would bind the company in ordinary matters will be sufficient in this. We think it was competent for the directors to consider this matter in the State or out of it, when convened for any purpose, whether with or without special notice. Indeed, it stands upon the same footing with any other suit. If instituted by any executive officer, and the corporation, with knowledge of it, fails to object within a reasonable time, we do not see why it will not be bound by it. This view of the case sufficiently answers the objections to the admission of evidence. Any evidence was competent which tended to prove that the directors authorized the proceeding, or, if not previously authorized, that they subsequently ratified it. It is quite apparent that the directors and the corporation are concluded by the result. If so, what reason for complaint has the town?

The other branch of the enquiry is whether the applications are brought in due form. Each one purports to be "the petition of the directors of the New York, New Haven & Hartford Railroad Company." Each one is signed, "THE DIRECTORS OF THE N. Y., N. H. & H. R. R. Co., by LYNDE HARRISON, their attorney." This seems to be a literal compliance with the statute. Perhaps it would have been more lawyer-like to have inserted the names of the directors; or, better still, to have brought it in the name of the corporation. However this may be, we think at this late stage of the case the court was justified in finding that the applications were duly brought by the directors, at their request and upon their order. The substance of the objection we have considered is repeated in a variety of forms in the first eight reasons of appeal. We believe, however, that what we have said is a sufficient answer to them all. We do not deem it necessary to consider each one by itself. In answer to the ninth reason of appeal, we have no hesitation in saying that the Shore Line Railroad, operated as it is by the

**Form of
application.**

**Lessee
owner of
road under
statute.**

New York, New Haven & Hartford Railroad Company, under a perpetual lease, is the road of that company, within the meaning of the statute. Section 3489.

We have not failed to observe that the learned counsel for the town in their brief have suggested and discussed several questions which the pleadings do not raise, which are not shown to have been made in the court below, and which the reasons of appeal do not specifically point out. Therefore we may properly pass them without further notice. But, as they are questions concerning which we entertain no doubt we will briefly notice the more important ones.

1. That the town has no power under this statute to take land for highway purposes. The answer is that section 3490 gives the power expressly, and it has sufficient power under the general statute relating to highways.

Power of town to take land—Statute not intended to enforce precedent duty.

2. That there is no precedent duty, by common law or statute, which this statute is designed to enforce. There need be none. It is enough that this statute makes it the duty of the town to unite with the railroad company in removing a dangerous nuisance.

3. That the statute (section 3489) does not contemplate the town as a party, makes no provision for giving it notice, and that it is not, in fact, a party. It is too late to claim that the town is not a party to this proceeding. Section 3483, which relates to the same subject-matter, does require notice to be given to the selectmen when the commissioners take the initiative. It is true that in section 3489 notice to the selectmen of the town is apparently omitted; and so, also, no notice is required to be given to cities or boroughs. The explanation is obvious enough. It seems to be assumed that one of these municipal corporations will be the petitioner, and, as such, no notice is required. By inadvertence, probably, when the railroad company is the petitioner, no express provision is made for notice to the corporation having charge of the highways. Yet we cannot doubt that the legislature intended that such corporations should have notice. Such is the fair implication of this section taken by itself, and that implication is materially strengthened when we consider the two sections together. The commissioners did, in fact, give notice in this case, and it is hardly possible that a case will arise in which notice will not be given.

Notice to town necessary.

4. It is said that the legislature cannot adjudge the expense of avoiding or abating danger created by one or another who is stronger; that the increasing number and velocity of trains cause the danger, and that the railroad company, and not the town, is benefited thereby; that the town did not create the crossing or

danger, and has no pecuniary interest in its continuance; and hence that the statute must be held to impose the duty of paying for these changes only on the railroad company. We cannot accept the conclusion, because it will be impossible to construe the statute as prohibiting the assessment of any portion of the expense upon the town. Nor are we prepared to grant the premises to the extent claimed. Some of the highways may have been laid out after the construction of the railroad, and so, in a sense, the town may be said to have created the crossing. The very existence of the railroad did in fact benefit the town. It increased the value of real estate; increased population and business; and the result was an increased grand list.

Then, again, the increase in the number and velocity of the trains is because the public required it. The business interests of the community, and the comfort and convenience of travellers, are supposed to be promoted thereby. Of such benefits the inhabitants of the town get their fair proportion. Considerations like these, and many others that might be suggested, induced the legislature to require towns to bear some portion of the expense of abolishing grade crossings. But the statute requires no vindication at our hands. We can only construe and enforce it. If its terms are plain and unambiguous, we have little or nothing to do with the reasons for enacting it.

The pleadings object to the statute as unconstitutional. It is to be noticed, however, that counsel for the town do not discuss the power of the legislature to pass such a statute, but the whole argument is directed to the expediency of doing so, and to defects in the act as passed. They contend that it is vague and uncertain; that it gives no rule by which the duty of the town can be ascertained, or its liability measured; that the tribunal is bound by no rule of evidence or law, but can decide as caprice or their sense of right may dictate, etc.; and from considerations like these the conclusion is reached that it is not a constitutional exercise of legislative power. We will not stop to consider the argument in detail, yet it must not be assumed that we concede the justice of the criticism. All we concede is that this statute, like many others, may be abused. If administered in the spirit of fairness intended by the legislature, substantial justice will be done. We see no indications that it was not so administered in this case. Indeed, counsel disclaim any reflection on the triers. The superior court, on appeal, can correct any abuses, if any such shall exist, and this court can correct any errors of law. The reasons suggested, therefore, falling short, as they do, of showing that the act is against natural justice, are not sufficient to require of us a judgment that the act is void.

**Legislature
may require
town to bear
expense of
changing
crossing.**

**Statute not
unconstitu-
tional.**

We might stop here, but we will add that the act in question is an exercise of the police power of the State. Its object is to change or remove certain conditions, lawful in themselves, but which have become a source of danger to life and property. The remedy consists in requiring those charged with the duty of maintaining the highways to change the conditions, and hereafter discharge their duties in such manner as to avoid the danger. It is doing no more than has been done for a long time. Towns have always been required to keep highways and bridges safe. Railroads have ever been required to use the utmost vigilance in adopting ways and means to secure the safety of travellers. It has never been considered that statutes for such purposes are in conflict with the constitutional right of trial by jury, or that proceedings to enforce them were not due process.

There is no error in this judgment.

The other judges concurred.

Alteration of Crossing—Appeal.—Under the provision of § 3480 of the Connecticut General Statutes of 1888, that railroad companies must, at the direction of the railroad commissioners, separate the grade from that of a highway at the intersection, by passing either under or over the latter, and must construct and maintain bridges in obedience to the order of the commissioners, no appeal lies from the order of the commissioners directing the change to be made, there being no statutory provision therefor. *City of Waterbury's appeal* (Conn.), 17 Atl. Rep. 355.

Under the Massachusetts Statute of 1878, p. 176, § 2, as re-enacted by Pub. St. 112, § 133, providing that any party aggrieved by the award of a special commission may apply to the court for a jury to revise and determine the matters of fact found therein, the jury has authority to revise and determine any question arising out of the apportionment of the cost of making the alteration between the railroad corporation, the county, and the city. *Boston & A. R. Co. v. City of Newton* (Mass.), 20 N. E. Rep. 106.

DALLAS AND GREENVILLE R. CO. *et. al.*

v.

ABLE.

(*Texas Supreme Court, November 30, 1888.*)

Crossing—Highway—Restoration—Instruction.—A charge that it was the duty of a railroad company to restore a road crossed by its tracks to such a state as not to *necessarily* impair its usefulness as a public highway, is misleading and erroneous, if it affects a material issue in the case when the statute requires that the company shall restore the road to such state as not *unnecessarily* to impair its usefulness.

Same—Assumption of Fact.—In an action to recover damages for injuries caused by the failure of a railroad company to restore a public road within a reasonable time after it had constructed its track across it, an instruction that "if

the railroad was so constructed that an ordinarily careful and prudent driver could not safely drive an ordinarily careful and safe team" across the railroad, the defendant was liable, is not open to the objection that it assumes that the plaintiff was a careful and prudent driver, and drove an ordinarily safe team.

Same—Sufficiency of Evidence—Contributory Negligence.—In an action to recover damages for personal injuries sustained at a crossing, it appeared that plaintiff drove along the road in the morning and noticed defendant's track-laying machine at a distance of 60 or 70 yards from the road. When he returned, three or four hours later, the track had been laid some three hundred yards beyond the point where it crossed the highway. No attempt had been made to put the crossing in order beyond laying a few loose planks between the rails, and perhaps one on each side on the end of the cross ties. On each side of the roadbed there was an uncovered water-way or drain about a foot deep. The plaintiff testified that the crossing could have been put in proper shape in 15 or 20 minutes. *Held*, that the evidence was sufficient to justify the jury in finding that a reasonable time for restoring the crossing had elapsed when the injury occurred; and that, under the circumstances, plaintiff exercised due care in going upon the track without stopping to inspect it.

Personal Injuries—Excessive Damages.—At the time of the accident plaintiff was a healthy, vigorous man, 44 years of age and accustomed to hard labor. He was stunned by the fall and his eye was injured. Although eighteen months had elapsed at the time of the trial, he had not recovered, and there was evidence to the effect that his eye was permanently injured, that he would ultimately lose it, and that this might affect the sight of his other eye; that 3 of his *vertebrae* were out of line, and that this injury was not curable, but was likely to result in his becoming a hunchback, and in paralysis. There was also testimony to the effect that plaintiff was suffering from a slight paralysis of the lower limbs. *Held*, that a verdict for \$6,500 was not excessive.

Construction of Road—Contractors—Implied Indemnity.—Where it is the duty of contractors for the construction of a railroad to keep the crossings in safe condition for public use, and a verdict against both the company and the contractor is returned for failure to do so, a verdict over against the contractors for the amount for which the railroad company is primarily liable, is properly rendered at the request of the railroad company.

APPEAL from District Court, Hunt County.

Action by William Able against the Dallas & Greenville R. Co., and J. F. O'Connor & Co., to recover damages for personal injuries sustained by the plaintiff through the negligence of the defendants. The defendants appeal from a verdict and judgment for the plaintiff.

Bryant & Dillard for appellant Dallas & Greenville R. Co.

R. E. Cowart and *W. C. Jones* for appellants J. F. O'Conner & Co.

Perkins, Gilbert & Perkins for appellee.

GAINES, J.—The facts which gave rise to this suit may be briefly stated as follows: On the 13th day of May, 1886, the Dallas & Greenville Railway Company entered into a contract with J. F. O'Conner & Co., its co-appellants, for the construction of its line of railway between the two cities designated by its corporate name. The contract bound O'Conner & Co. to complete the road, under the supervision of the chief engineer of the railway company for certain considerations therein expressed. O'Conner & Co. entered upon the work under

Facts.

their agreement, and on the 25th day of August, 1886, they laid the track across a public road known as the "Dallas & Greenville Road," at a point of intersection about one-quarter of a mile from the residence of appellee. At about 8 o'clock of the morning of that day, appellee with an empty wagon crossed the railroad at the point of intersection, going to a hay press in the neighborhood. At this time the track had not reached the crossing, but the track laying machine was being operated in laying the track a very short distance east of the point of intersection, and was seen by appellee. It was at from twenty to sixty yards east of the crossing, according to appellee's testimony. At the intersection there was a cut about seven feet deep for the roadbed, which was approached by steep inclines upon either side, in order to facilitate the passage of persons and vehicles along the dirt road. Having gone to his point of destination and loaded his wagon, appellee started home and reached the crossing between 11 and 12 o'clock in the day. He saw the track laying machine as he approached, in operation, about 300 yards southwest of the place of intersection. Presuming, as he testified, that the track had been laid and the crossing put in order, after having caused his son, who accompanied him, to lock his wagon, he started down the incline without having first stopped to inspect the condition of the track. The ties and rails had been laid, but nothing had been done to restore the crossing, except some planks laid between the rails, and, perhaps, a plank outside the rails upon the end of the cross ties. There was a ditch on each side of the roadbed, intended as a water way, or drain for the brook, about a foot deep. This condition of affairs, appellee testified, he did not discover until it was impossible to stop his wagon. It was accordingly precipitated, one wheel upon the end of a cross tie and the other upon the rail, resulting in a jolt which threw him head foremost from his seat to the ground. His head struck upon a cross tie and he received serious injuries. He brought this suit to recover damages against both the railroad company and the contractors, and obtained a verdict and judgment against both. The railroad company, in its pleadings, asked that in the event a judgment was obtained against it, it have a judgment over against the contractors for the amount, and recovered a judgment as prayed for.

The appellant company and J. F. O'Conner & Co. file separate assignments of errors. The first assignment by O'Conner & Co., that "the court erred in refusing the special charge asked by appellants jointly," would be sufficiently specific, if, as the assignment indicates, the appellants jointly asked **Assignments** but one charge. But the record shows that the **of error.** instructions referred to contain four paragraphs, each presenting a distinct proposition, and, therefore, the assignment

is not in conformity to the rules, and does not require consideration. For the same reason the second assignment by O'Conner & Co. is insufficient. The instructions asked by O'Conner & Co. separately embraced two distinct charges, and the assignments should have specified particularly which was complained of. The rule which prohibits the practice is uniformly upheld by this court, and has been too frequently decided to require the citation of authority to support the ruling. Before proceeding to the consideration of the next assignments, which are predicated upon supposed errors in the charge of the court, we will say that in our opinion that charge, taken as a whole, presented very fully the issues made by the pleadings and evidence, and was in the main a very clear and accurate exposition of the law of the case as applicable to every phase of the testimony, and omitted nothing which made a special instruction either necessary or proper. The assignments upon it, however, present some questions which are worthy of consideration. The first and most serious question is presented by the second and third assignments of the appellant corporation, and the third and fourth of O'Conner & Co. They are in the same language and complain that the court erred in using the word "necessarily" in the following paragraphs of the charge: "(2) The Dallas & Greenville Railway Company had the right to construct its road and lay its track across the Greenville and Dallas dirt road; but if said dirt road was a public road or highway, it was the duty of the railway company, after its road was constructed, and the track laid across the dirt road, if the construction of such railway and laying the track injured the road or rendered travel over it more difficult, to restore the dirt road to its former state, or to such a state as not to necessarily impair its usefulness as a public highway. (3) If the Dallas & Greenville Railway Company did construct its road and lay its track across the Greenville & Dallas dirt road, and if said road was a public road, and the construction of the road and laying the track injured the usefulness of the dirt road, then the railway company was entitled to a reasonable time in which to restore the road to its former state, or to such as would not necessarily impair the usefulness of the highway; and if plaintiff was hurt in attempting to cross the railroad before a reasonable time had elapsed for such restoration, he would not be entitled to recover."

The language of the statute which prescribes the law upon this subject, so far as it relates to public roads, is as follows: "Such corporation shall have the right to construct across . . . any . . . highway, which the route of said railway shall intersect; but such corporation shall restore the . . . highway . . . thus intersected . . . to its former state, or to such state as not unnecessarily to impair its usefulness," etc. Rev. St. art. 4170. The meaning of this is obvious. The legislature evident-

ly considered that the construction of a railroad across a public road, would of necessity detract from its utility to some extent, and clearly meant to prevent an impairment of the crossing to that extent only. So far as the impairment of the usefulness of the highway by the construction of the railway could be reasonably avoided, it was not allowed. It is argued on behalf of appellee, that the word "necessarily," used in the charge, means substantially the same as "unnecessarily." But we cannot assent to this proposition. A positive and negative of the same term cannot be synonymous. In support of the proposition that the two words are used interchangeably for the purpose of conveying the same idea, we are cited to the case of *Missouri, K. & T. R. Co. v. Long*, 27 Kan. 684; 6 Am. & Eng. R. R. Cas. 254, which quotes a statute of the State of Kansas, couched in substantially the same language as ours, except that the word "necessarily" instead of "unnecessarily" is employed. The case cited does not construe this term; and we do not undertake to say in what sense it was employed in the Kansas law; but our statute permits an impairment of the public road, so far as such impairment could not be reasonably avoided. Therefore a charge which instructs the jury that it is the duty of a railroad company to restore a highway at a crossing to such a condition as not necessarily to impair its usefulness, admits of the construction that, if the utility of the highway be to any extent diminished, although a necessary result from the construction of the railway, the company has failed of its duty. The charge, if it affected a material issue in the case, would have been misleading, and a ground for a reversal of the judgment.

Railway company must restore highway.

Not "necessarily" and not "unnecessarily" obstructing highway.

But the question whether the state of the crossing at the time of the injury was such as unnecessarily to impair the use of the public road is not presented by the facts of this case. The evidence shows that at that time no steps had been taken to restore the crossing. The ditches were uncovered, the ends of the ties were protruding, and nothing had been done to relieve the jolt in crossing the rails, except the laying down of a few loose planks. The crossing was restored at a later hour in the evening of the same day, but as it stood at the time the accident occurred, the jury could have come to but one conclusion, and that: that the railroad, in its condition at that time, did unnecessarily impair the use of the dirt road. Whether the impairment of the usefulness of the public road was necessary or not was not a controverted question.

Question whether highway unnecessarily obstructed not in case.

The substantial issues of fact presented by the evidence were (1) had a reasonable time for the construction of the crossing

elapsed when the injury occurred? and (2) was the appellant guilty of contributory negligence? We conclude, therefore, that the charge, though erroneous as an abstract proposition, did not mislead the jury, and is therefore no ground for reversing the judgment. In order to show the little importance that was attached at the time of the trial to the use of the word complained of in these charges, it is to be noted that in the first instruction asked jointly by defendants, and refused by the court, the same word is used in substantially the same connection.

It is also assigned by both appellants that "the court erred in the fourth paragraph of the charge in its instructions to the jury as to the degree of care required of appellee in crossing the track of said railway, under the circumstances and at the time he did so, as shown by the evidence of appellee, and he should have exercised a higher degree of care than ordinary care, and the court erred in not charging to that effect." The assignment is not well taken.

The degree of prudence required of the defendant in approaching the crossing was ordinary care. Ordinary care must always be proportionate to the dangers that are to be encountered. The test is, what would a man of ordinary prudence do under the same circumstances? The paragraph of the charge complained of in this assignment was in accordance with this view of the law, and very clearly presented the issue of contributory negligence. The fifth paragraph is complained of upon the grounds that it uses the word "necessarily" in place of "unnecessarily," as in the charge previously considered, and that it is upon the weight of the evidence. The first ground requires no further discussion. The instruction is as follows: "Or if the road was so constructed at the crossing that an ordinary careful and prudent driver could not safely drive an ordinarily safe team across the railroad without risk or danger, then, if the contractors did not within a reasonable time restore the road to its former state, or fix the crossing so as not to necessarily impair its usefulness, then both the railway company and the contractors would be responsible for injuries inflicted to a person hurt in attempting to cross such crossing, if the hurt was occasioned by the defective construction thereof, unless such person should be deprived of his right to recover on account of his own contributory negligence." It is insisted that this charge assumes "that the plaintiff was a careful and prudent driver, and drove an ordinarily safe team." We do not so construe it. We understand it to instruct the jury, in effect that if a careful driver with a safe team could not drive over the crossing in safety, it was not such as the law requires. The charge correctly states the law, and is not obnoxious to the objections made to it.

It is further complained that "the court erred in the sixth para-

graph of its charge in charging the jury that a person travelling upon the public highway and approaching a crossing of such highway, who is ignorant of the defective condition of such crossing, and who does not know of such facts regarding the crossing as would put a prudent man on enquiry as to its condition, can legally presume that it is in safe condition." This part of the charge, though abstractly correct, might be misleading, as applied to the facts of this place, if it stood alone; but it is immediately qualified by this language: "But if he knows the condition of the crossing, or is in possession of facts that would require an ordinarily prudent man to enquire into its condition before going upon it, then it would be his duty to make enquiry as to the condition of the crossing before going upon it." Taken together, the instruction is not subject to objection. It is also urged that the eighth paragraph of the charge was erroneous, because it did not define contributory negligence. The charge had already defined contributory negligence abstractly, and the jury had been told under what circumstances the plaintiff should be deemed negligent in going upon the crossing, and it was not necessary to repeat the definition.

Duty to ascertain condition of highway.

The tenth assignment of error of O'Conner & Co., that "the court erred in overruling these defendants' motion for a new trial," is too general to be considered. That, however, of the appellant company is specific, and raises the question of the sufficiency of the evidence to support the verdict in two particulars. It is claimed first, that the evidence showed that a reasonable time had not elapsed when the accident occurred for restoring the crossing. The testimony showed that the track had been laid some 300 yards beyond the crossing when appellee attempted to pass. He testified that it could have been made in fifteen or twenty minutes. This is not controverted by any witness, though one of the contractors subsequently testified on the trial. The statute requires that the crossing shall be restored, but of course the company was entitled to a reasonably sufficient time in order to do this. By this is meant such time as was necessary to accomplish the object without unreasonable expense. The public were entitled to the use of the highway, and the company had the right to disturb its enjoyment only so long as the construction of the road rendered such disturbance necessary. If any reason existed why this could not be done immediately after the track was laid, it could and should have been shown. The work was done within a few hours after the accident, and no fact is shown or reason assigned why it was not done immediately. We think the verdict of the jury supported by the evidence in this particular. But it is also claimed that the evidence showed that appellee was guilty

Sufficiency of evidence to support verdict.

of contributory negligence. He passed the railroad at 8 o'clock in the morning and saw its condition. The track laying machine was very near it. When he returned, between three and four hours, he observed that the machine was laying the track some three hundred yards beyond it, and he believed, as he testified, that the crossing could be restored in a few minutes. When he returned he might reasonably have inferred that the track had been laid for a time more than sufficient to permit the highway to be put in order. If it was his duty to presume that the parties who were constructing the road had failed in their duty, then he was negligent. On the other hand, in the absence of a knowledge of some fact indicating that there would be a failure in this respect, it would seem that he might properly have presumed the legal duty of the company had been performed. It was for the jury to determine, under all the circumstances disclosed by the evidence, whether or not he exercised due care in going upon the track without stopping to inspect it. Having found that issue in favor of the plaintiff, under the facts in evidence as above detailed, we do not feel warranted in disturbing the verdict.

It is complained also that the verdict is excessive. The appellee was a healthy vigorous man, about 44 years old at the time of the accident, and accustomed to hard labor. By his fall he was stunned, and his eye was injured. Some eighteen months had elapsed at the time of the trial, and he had not recovered. His sufferings had been great, his spine affected, and he had been unable to do any considerable amount of work. The physician who was examined on the trial testified that his eye was permanently injured, and that he would ultimately lose it; that this might affect the sight of his other eye, but not necessarily; that he was also suffering from an injury in his back, which was likely to have resulted from his fall; that three of his *vertebræ* were out of line, protruding as much as one-fourth of an inch too far, and that this injury was not curable, but was likely to result in his becoming a hunchback, and in paralysis. Witnesses also swore that the symptoms testified to by him indicated slight paralysis of his lower limbs, and that, in their opinion, he would never be able to labor, and that hard work would be injurious, and would likely prove fatal. A verdict for \$6,500 predicated upon uncontroverted evidence of this character, does not evince that it was the result of passion or prejudice, and it cannot be set aside upon appeal.

The court charged the jury that if they found a verdict for plaintiff, against the railroad company, and found also that the injury resulted from the negligence of the contractors in failing to restore the crossing, then to find a verdict in favor of the railroad company against O'Conner & Co. O'Conner & Co. assign this charge as error. The written contract between the railroad

company and the contractors was introduced in evidence. It contains this provision: "Public and private roads recognized as such by the engineer, when crossed by the line of the road, must be kept open in condition for use until such permanent roads as may be directed by the engineer are formed and ready to receive the regular travel." It is submitted that there was not sufficient evidence that the road was public, or that the railroad company's engineer recognized it as such. A number of witnesses testified that it was a public road, among them a county commissioner, who said that the commissioners' court were accustomed to apportion hands to work it. There was no evidence which throws the shadow of a doubt upon this question. Whether the engineer formally recognized it or not is immaterial. The object of putting in the qualifying clause, "recognized by the engineer as such," would seem to have been to enable the company, by the act of its engineer, to remove all doubt as to the duty of the contractors, where a question of keeping open a road should arise between themselves. That the parties who constructed the railroad recognized the dirt road as public is shown by the fact of their cutting down the banks as approaches to the crossing; by their opening the construction to let wagons pass on the day of the accident; and by the further fact that they made a good crossing after the accident, on the same day it occurred. It was the duty of the contractors, under their contract, to keep this crossing in safe condition for public use; and if any injury resulted from their failure to do this, for which the railroad company was held responsible, they were liable to the company to make good the loss. The court did not err in so charging. It was immaterial whether, under the contract, O'Conner & Co. were independent contractors or not. If not, they were liable to the company for damages recovered of it by reason of their own negligence. *Water Co. v. Ware*, 16 Wall. 566. The injury having been caused by the negligence of the contractors, they are primarily liable in any event; and the company employing them, being compelled to pay the damages, they become responsible to it for the amount. *Wood, Mast. & Serv.* § 325, and cases cited.

We find no error in the proceedings of the court below which requires a reversal of the judgment, and it is therefore affirmed.

Personal Injuries—Defective Crossing—Sufficiency of Evidence.—In an action to recover damages for personal injuries, there was evidence tending to show that defendant had three tracks crossing a street at right angles to it; that deceased approached the tracks driving a pair of mules and seated on the top of a load of wood; the wood having been piled lengthwise in an ordinary road or box wagon until the latter was full, then other pieces were placed crosswise upon the top. The wood was thus raised some two or three feet above the top of the wagon box. The defect alleged and the place of injury were at the third track, the last one reached by the deceased in the direction he was going. This third track was neither

planked nor level with the roadway over a portion or all the width of the street. According to plaintiff's evidence a plank crossing, which began at an adjoining depot, extended to a point near the beginning of the street, leaving the track across the whole width of the street in the negligent condition described. According to the defendant's evidence, the plank crossing reached a point about the centre of the street. There was evidence tending to show that the load of wood in deceased's wagon was jostled out of place. In passing the third track the wood rolled down and hit the mules, and the deceased was thrown off, run over and killed. On defendant's part there was evidence tending to show that before the deceased reached the tracks the wood had shifted and begun to fall, and considerable evidence tended to show that the injury arose from other causes other than the track. *Held*, that notwithstanding the conflicting evidence, it was sufficient to sustain a verdict for the plaintiff. *Tetherow v. St. Joseph & T. M. R. Co. (Mo.)*, 11 S. W. Rep. 310.

Same—Competency of Evidence.—In such action the defendant offered evidence to the effect that no other accident had ever happened at the crossing, either before or since the accident to the deceased. *Held*, that the plaintiff might thereafter show that no injury had since occurred at that point because the crossing had since been repaired. *Tetherow v. St. Joseph & T. M. R. Co. (Mo.)*, 11 S. W. Rep. 310.

Crossings—Construction and Maintenance.—As to duty of company to construct and maintain crossings, see 4 Am. & Eng. Encyc. of L. 907.

SHOEBRINK

v.

CANADA ATLANTIC RAILWAY COMPANY.

(16 Ont. Rep. 515.)

Personal Injuries—Negligence—Signals—Highway.—In 1871 the owner of a block of land had a plan made and registered laying out the land into lots with streets, etc. Most of the land, including that part marked on the plan as O street, was fenced in and used for pasturage, and so continued until 1881, when a portion thereof, including O street, no lots fronting thereon having been disposed of, was sold by the owner to the defendants, who treated the land as their private property, using it as a shunting yard. The plaintiff, a little boy, who lived with his father near by, was standing on a snow bank on the side of the track where it crossed O street. He saw a train approaching and when it came opposite where he was, it gave a jerk, which frightened him, and he slipped down on to the track and was run over by the train and injured. No whistle was sounded or bell rung. *Held*, that the omission to sound the whistle or ring the bell did not impose any liability on the defendants, as it in no way contributed to the accident. *Held*, also, that O street, as marked on the plan, was not a highway within the meaning of the Railway Act.

ACTION to recover damages for an accident received by the plaintiff, a young boy, by being run over by a train of the defendants.

Facts. The plaintiff, in his evidence, stated that during the year 1887 he lived with his father on Ann street, in the village of Stewarton. In the month of April he went to look for his little brother, and was standing on a snow bank close

to the the railway track. He was looking in the direction in which a train was coming, and saw it approaching. As the train got opposite where he was it stopped, and the cars gave a jerk, which frightened him, and he slipped down the snow bank under the cars, and the wheels went over his hands, cutting off his left hand and two fingers of his right hand. No bell was rung or whistle sounded as the train approached. It was urged that the place where the accident happened was a street, and that the whistle should have been sounded, or bell rung, as the train approached, and that the omission to do so was evidence of negligence on the part of the defendants. The additional evidence, so far as material, is set out in the judgment of MacMahon, J.

The action was dismissed by the trial judge on the ground there was no evidence to submit to the jury. Plaintiff thereupon moved to set aside this judgment, and to enter judgment for the plaintiff, on the ground that there was evidence of negligence, which should have been submitted to the jury, because the place where the accident happened was a street, and that no bell was rung or whistle sounded when the train was passing.

Robinson, Q. C., for plaintiff.

McCarthy, Q. C., *contra*.

GALT, C. J.—The subject of this painful accident is a little boy. [The chief justice, after setting out the evidence, proceeded.]

It is manifest from the foregoing evidence that at the time when the unfortunate accident happened the plaintiff was not intending to cross the railway track. He had placed himself on a snow bank very close to the track, and as the cars were passing he became frightened and slipped off the bank, and was run over. It is, therefore, evident that the omission to sound a whistle or to ring a bell had nothing to do with the accident. I therefore agree with the learned judge that there was no evidence to go to the jury of any negligence on the part of the defendants. It was simply an accident caused by the youth of the plaintiff.

Accident not
caused by
omission to
give signal.

The case of *Williams v. Great Western R. W. Co.*, L. R., 9 Ex. 157, is in many respects similar to the present; but the ground on which the learned judges set aside the judgment of the learned judge at the trial, dismissing the action, is not applicable to the present. In that case there was no evidence as to the cause of the accident, the plaintiff being so young that he could not be examined as a witness. In the case now before us we find that the plaintiff took up a position on a snow bank close to the track, and being frightened he slipped down, and was injured.

ROSE, J.—It is very difficult to understand exactly how the facts are in this case. The lad's evidence is not free from many contradictions. I would judge, however, that he took his position

on a slight mound of snow about two feet in height, looking in the same direction as that in which the train moved, but not looking directly at the track: that he was about five or six feet from the train, although at one place he said about two feet, but he was so far away that he said he could not touch it with his hand; that the train was standing there when he took his position, although this is not perfectly clear. If he was not, then it may be that the train moved up alongside of him, the engine passing him and then stopped, for he says he was startled by the noise of a "jerk." At all events, he knew the train was alongside of him before he heard the noise. Startled by the noise, he probably turned towards the train; at all events, he lost his footing and fell under the wheels and was injured. He lived near by; knew that he was standing near the track, and that the train had drawn up and was alongside, either stationary or moving.

What was the negligence that "was so connected with the accident to the plaintiff as to entitle a jury to be consulted as to whether the action is maintainable?" to use the words of Kelly, C. B., in *Williams v. Great Western R. W. Co.*, L. R. 9 Ex. 157, at p. 160.

It was contended:

1. That the place where the lad stood was a highway, and so there was negligence in that, that the bell did not ring nor did the whistle sound.

Assume it to have been a highway. I do not see how the neglect to ring the bell or sound the whistle in any wise caused the accident. The lad was not using the land as a highway; he was not crossing or intending to cross; he was not upon the railway track at all; he had knowledge of the fact of the track being where it was, and of the train being upon the track; he chose his position with this knowledge, and the sounding of the bell or whistle would not have given him greater knowledge.

Unless the statutory duty was created with the object of preventing the mischief complained of, it will not assist the plaintiff: *Gorris v. Scott*, L. R. 9 Ex. 125.

But I do not think that "highway" means highway in law, but highway in fact. To illustrate: Suppose a concession road had been surveyed and used as a highway, but afterwards closed by the wrong of some person or persons, the side fences taken down, all traces upon the ground obliterated, and thus not used as a road, and that a railway line or track was laid down crossing this road.

Could it be successfully contended that the company's servants in running its trains must, whenever a train passed such road, ring the bell or cause the whistle to be sounded, under a penalty; or

**Statement
of facts.**

**Failure to
give signal
not cause of
accident.**

**Meaning of
"highway"
in statute.**

that a man happening to be upon the ground where the track crossed the road, and there suffering an accident, could search out the records in the crown office, or the facts as to user some years prior, so as to fix the railway company with liability for neglect of duty in not observing the statutory precautions required to be taken by section 16 of R. S. C. c. 109? Or, if a trespass road had been established in lieu of an original allowance, but under such circumstances as would entitle the owner of the land to have the trespass road closed and the original allowance opened, would the company be free from the liability to observe the statutory precautions as to the trespass road and be compelled to observe them with reference to the unopened original allowance?

I see no evidence to support the contention that the place where the lad was standing was a highway within the meaning of the act.

Section 2, R. S. C. c. 109, interprets "highway" as including "any public road, street, lane, or other public way or communication." Language which seems to me to indicate a way, in fact, upon the ground.

It was further contended that if this was not a highway there was a statutory duty to fence. Whatever argument may hereafter be founded on the amendment to the railway act of last session, made, as I understand, in consequence of the decisions of our court of appeal in *Conway v. Canadian Pacific R. W. Co.*, 12 A. R. 708, and *Davis v. Canadian Pacific R. W. Co.*, 12 A. R. 724, it seems difficult, upon the act as it stood when this accident occurred, to found upon the language of the statute any argument which entitles this plaintiff to the benefit of any neglect on the part of the company to fence, if any such neglect there was. The duty was not to fence as against him, as I read the statute and the decisions.

**Duty of
company to
fence track.**

The third ground taken was that, apart from the statute, there was a common law duty imposed upon the company to conduct its business with reasonable care; and therefore it was a question for a jury to determine whether on the facts of this case the company should reasonably have been required to fence. *Patterson's Railway Accident Law*, pp. 40, 145, and *Pollock on Torts*, 352, were cited.

**Common
law duty of
company.**

This involves the proposition that a jury might well find that the company owed a duty to the lad to fence the track, so as to prevent him standing so near the cars that, when startled and losing his footing, he would fall under the wheels of the train.

As a general statement of law it is clear that "in the absence of any statutory provision to the contrary, a railway company is under no obligation to fence its track: *Conway v. Canadian Pacific R. W. Co.*, at p. 721. And when the trains are run under

statutory authority, and with certain defined obligations as to fencing, I would require direct and binding authority before I would lay it down as law that a railway company was bound to fence its track, so as to prevent persons standing so near as to be in danger of falling under the train in case of losing their footing, that is to say, that it owed such duty to the person who might choose to place themselves in such a position.

I have considered the above questions as if the lad had a right to be where he was. If not, the defendant's arguments will tell against him with greater force.

In my opinion the motion must be dismissed.

MACMAHON, J.—I fully agree with the learned chief justice that the plaintiff's motion must be dismissed.

I do not think O'Connor street, near to which the accident happened, can be considered a public highway even if the fact that it was such could have any influence in determining the judgment in the case.

Place of accident not "highway." In 1871 Mr. McLeod Stewart, being the owner of some lands in the township of Nepean, adjoining Ottawa, laid out a portion into town lots, and called it "Stewarton," a plan of which was registered. The streets, so far as is necessary for this case, were named from east to west, Elgin, Metcalfe, O'Connor and Bank; and those from north to south, Argyle, Catharine and Isabella.

Since the registration of the plan Mr. Stewart had sold lot 11 on Catharine street and lots 13, 14 and part of 15 on Bank street.

Most of the lands were fenced in and reserved for pasturage by Mr. Stewart between the years 1871 and 1881, when he sold portions to the defendants' railway, which has since then acquired all the lands on the plan between Catharine and Isabella from north to south, and Elgin to Bank from east to west, except the lot on Catharine street and the two and one-half lots on Bank street previously disposed of by Stewart. Between the boundaries above given the railway company have their shunting yard, treating Metcalfe and O'Connor streets as laid down on the plan registered by Stewart as their private property.

Under R. S. O. (1877), c. 146, sec. 67, where an individual lays out a town or village, it is only where lots of land fronting on or adjoining streets according to the survey and plan have been sold to purchasers, that such streets shall be considered public highways or streets. And sec. 72 provides for the alteration or the cancellation of the former survey; but by sec. 2, "no part of any street or streets shall be altered or closed up upon which any lot of land sold abuts, or which connects any such sold lot with or affords means of access therefrom to the nearest public highway."

Under that act the mere survey and registration of a plan showing streets is not sufficient to make them public streets or highways unless lots of land fronting on or adjoining such streets have been sold to purchasers.

No lots were sold fronting on or adjoining O'Connor street, so that what was done by Mr. Stewart by a survey and registration of the plan did not necessarily constitute it a highway or public street.

Andrew Heakey, who was overseer of highways at Stewarton for some years, said he graded O'Connor street in 1881 between Argyle avenue and Isabella street, and made it passable. A portion of the work put on the street was paid for by money he got from the municipality of Nepean and the statute labor. He says no work was done on that street after 1881.

The evidence does not show that this was a road upon which the public money has been usually expended or whereon the statute labor has been usually performed, so as to make it a highway within sec. 524 of R. S. O., c. 184. See *Regina v. Plunkett*, 21 U. C. R. 536, at p. 541.

Between Catharine and Isabella streets there is no evidence of user of O'Connor street between 1871 and 1881, as it was, as already pointed out, enclosed and used as a pasture field.

If it was not a highway, then was it obligatory to fence? I think not. The 13th section of the Railway Act (R. S. C. c. 109) provides that a railway shall within a time therein limited erect and maintain fences on each side of the railway of the height and strength of an ordinary division fence. And sub. sec. 2 of sec. 13 provides, "If . . . such fences . . . are not duly made and completed, or if after they are so made and completed, they are not duly maintained, the company shall be liable for all damages done on the railway by its trains or engines to the cattle, horses or other animals of the occupant of the land, in respect of which such fences . . . have not been made or maintained."

**Obligation
of company
to fence.**

There is a somewhat similar provision in the Imperial Act, 8 Vic. c. 20, sec. 68; and in *Buxton v. Northeastern R. W. Co.*, L. R., 3 Q. B. 549, 554, in considering that statute, it was said that a railway company are not bound at common law to maintain fences sufficient to keep cattle off the track under any circumstances; and that the obligation imposed by sec. 68 of the Act, "exists solely between the railway company and the owners and occupiers of the adjoining lands." See also *Ricketts v. East and West India Docks, etc.*, R. W. Co., 12 C. B. 160, at p. 175, judgment of Jervis, C. J.

If there is no common law liability imposed upon a railway company to fence, and if the obligation imposed by the statute to fence exists solely between the railway company and the

owners and occupiers of adjoining lands so as to prevent the cattle of the latter from straying on the railway, then no question can arise in this case as to whether the railway company did or did not maintain fences around the railway grounds where this accident to the plaintiff happened.

According to the evidence, the plaintiff was on the railway company's premises, a few feet from the line of O'Connor street, and had got on top of a snow bank about two feet high and four or five feet from the railway track, and was looking across to see if his brother was in the yard adjoining the house of a Mr. Nidd, and while so looking an engine attached to a train of cars passed him, and, after passing, he says the cars gave a "jerk," and frightened him, and he slipped from the snow bank under the cars, and was injured by the cars passing over his hands.

Was there any negligence proved here against the railway which was the cause of the injury complained of? It was urged

that the company were guilty of negligence in not ringing the bell. If the place where the engine and cars were crossing was the yard of the railway company, then it was not necessary to ring a bell at all because of their being on their own premises, and the statutory obligation to ring only applies where the train is about to pass a public highway.

The object in ringing the bell is to warn people who are on the track, or are about crossing it, of the approach of the train, so as to enable them to get out of the way. The plaintiff was neither on the track nor about to cross it when the engine and cars passed him. He saw the engine pass; saw the cars opposite to him; so that, even were it to be considered negligence in not ringing the bell, the omission to do so did not contribute to the accident by which the plaintiff was injured.

In *Shearman and Redfield on Negligence* (4th ed., vol. 2), sec. 469, to which we were referred by Mr. Robinson, the law is thus stated: "When a human being is injured at a railroad crossing, there is a reasonable presumption that the warning conveyed by the sound of a bell or whistle would have been beneficial to him; and, therefore, in such a case, it should be presumed that his injury was caused by the omission of such signals, if they were omitted. But if, without these signals, the injured person knew, or by the exercise of ordinary care would have known, of the proximity and approach of the train, this presumption is rebutted; and, without further evidence connecting the omission of the signals with the injury, the company is not responsible for it on that ground alone."

Here the plaintiff saw the train within four or five feet of and directly in front of him; but he did not recede from his position of danger, if dangerous he considered it.

I refer also to *Williams v. Great Western R. W. Co.*, L. R. 9 Ex. 157, and to the judgment of Pollock, B., at p. 161, where he quotes from the judgment of Willes, J., in *Daniel v. Metropolitan R. W. Co.*, L. R., 3 C. P. 216, at p. 222, which was approved in the same case in House of Lords, L. R., 5 H. L., 45. "It is not enough for the plaintiff to show that there has been an accident upon the defendants' line, and thence to argue that the company are liable, even *prima facie*. It is necessary for the plaintiff to establish by evidence circumstances from which it may fairly be inferred that there is reasonable probability that the accident resulted from the want of some precaution which the defendants might and ought to have resorted to; and I go further and say that the plaintiff should also show with reasonable certainty what particular precautions should have been taken." See also the judgment of the H. of L. in *Wakelin v. London & Southwestern R. W. Co.*, 12 App. Cas. 41.

The plaintiff's motion must be dismissed.
Motion dismissed.

Personal Injuries—Negligence—Obstructing Crossing.—In an action to recover damages for injuries sustained by a boy of six years of age, it appeared from the uncontradicted evidence that in front of one of the defendant's depots there were three tracks, a main track and two switches, one for passing trains, the other for station cars. The freight train by which plaintiff was injured was drawn in on the passing or middle track to permit a passenger train to pass. It remained on the passing track until the passenger train arrived and cleared the switch,—a period of twenty to thirty minutes. The train contained from twenty to twenty-five cars and, while remaining on the passing track, blocked both a public and the depot crossing. The plaintiff's testimony was that he started down the depot to get a paper, that he did not go to the public crossing but went to the depot crossing, that he found that a freight train was across the crossing, that he started to go around the train in front of the engine, that the train commenced to move and he then started back towards the caboose to go around by the road to get the paper, that he "ran back a piece" when he stumbled and fell on his back and his arm went under the train and the train passed over him. The other evidence for the plaintiff tended to prove that the tracks in front of the depot were straight, that the space over which the boy ran forward and backwards and the point where he was injured could be seen from the engine and caboose, and that no signal was given immediately before or at the time the train started. The evidence for the defendant tended to show that as plaintiff started to go around the freight train, it began to move and he took hold of an iron ladder running up the side of the cars, drew himself on the ladder and clung there until the train began to go pretty quickly, when he jumped off, stumbled and fell, threw his arm out and the train ran over it. The negligence charged against defendant consisted: (1) In stopping its freight train on the passing track for a period of twenty or thirty minutes without opening it at the crossings; (2) in starting it without giving a signal; (3) in starting it after it was discovered, or when by the exercise of reasonable care it may have been discovered, that plaintiff was in a dangerous position, and (4) for not stopping the train in time to prevent the injury after having discovered, or when by the exercise of reasonable care they might have discovered, that plaintiff was in a perilous situation. The court held that the failure of defendant's servants to open a pass way at the public crossing was in no way connected with the injury, that there was no evidence tending to show that the plaintiff desired, intended, or at any time attempted, to cross the tracks at the public crossing, that the crossing deceased intended to use was the depot cross-

ing, and that while, in view of the purpose for which that crossing was made and the use of it by the public as an approach to the depot, it was the duty of the defendant's servants at all times in the management of trains to exercise a care and caution commensurate with the danger naturally arising from such use, it was not its duty to keep it constantly open. It was also *held* that the plaintiff's evidence showed that it was not the duty of the company to have the crossing open at that time. The court further held that the failure of the train hands to give a proper signal of their intention to stop was not the proximate cause of plaintiff's injuries and that there was no evidence in the case that any servants of the defendant actually knew the situation of the plaintiff either before or after the accident, and that if the conductor had known the plaintiff's situation it could not be said that in view of his duty to move the train he was guilty of carelessness in starting it, or that there was any want of ordinary care in its management after it commenced to move. *Barkley v. Missouri Pacific R. Co. (Mo.)*, 9 S. W. Rep. 793.

Statutory Signals—Who Entitled to Benefit of.—See 4 Am. & Eng. Encyc. of L. 927.

GALVESTON, HARRISBURG AND SAN ANTONIO R. CO.

v.

KUTAC *et al.*

(*Texas Supreme Court, February 12, 1889.*)

Injuries Causing Death—Right of Action—Parties.—Although, under the provisions of the Texas statute (Rev. St. Art. 2899) giving a right of action for negligently causing death, it is intended that only one suit should be brought, the children of a person so killed will not be precluded from maintaining an action by the fact that their father brought a suit unsuccessfully therefor, when it appears that the defendant failed to have the children made parties plaintiff to such suit.

Same—Imputed Negligence—Gratuitous Carriage.—The negligence of the driver of a wagon is not to be imputed to a person travelling therein gratuitously by the permission of its owner.

Same—Instruction—Error.—An instruction that a recovery cannot be had if a person killed while travelling in a wagon when crossing a railroad track gave such assistance, or advice, or had such control of the driver's actions as contributed to his injury is incorrect, when the jury may infer from the fact that the driver was whipping and urging his team at a rapid rate of speed as if to reach the track and cross before the engine, that unless he thus contributed to his injury, plaintiff could recover.

Same—Right of Action—Adult Children.—Under the Texas statute, a child is entitled to recover damages for negligently causing the death of his parent, although at the time of the death he should be more than twenty-one years old.

Same—Argument—Improper Language.—In an action to recover damages for negligently killing plaintiff's mother, plaintiff's counsel used the following language in addressing the jury: "These powerful railroad corporations will not do justice to anyone unless compelled to do it. If they were to kill your horse to-day, they would not pay you anything for it but they would tell you to sue and go to the court for your money and then they would fight you with all their power. They will take any advantage of you they can, no matter how just your case. Now, I hope you will make them pay the last cent you can in this case for killing their mother." *Held*, that the use of such language was improper;

and that the fact that the jury returned a verdict "for the full amount sued for" showed that it had been influenced by the language employed, notwithstanding the direction of the court to pay no attention to it.

APPEAL from District Court, Colorado County.

Action by John Kutac on his own behalf and as next friend of Rosalie and Johanna Kutac against the Galveston, Harrisburg & San Antonio R. Co. to recover damages for negligently causing the death of plaintiff's mother, Annie Kutac. Defendant appeals from a verdict and judgment for the plaintiffs.

W. N. Shaw and Clark, Dyer & Bolinger for appellant.

Phelps & Lane and Ford, Thompson & Townsend for appellees.

HOBBY, J.—This action was brought by the surviving children of Mrs. Annie Kutac, to recover actual and exemplary damages sustained by reason of her death, which resulted from a collision between a locomotive of defendant and a **Facts.** wagon in which she was riding. The plaintiffs claim that the proximate cause of the collision in which she received the injuries resulting in her death was the gross negligence of those in charge of the engine and cars of appellant in running the same at a dangerous and reckless rate of speed over its road, through the town of Schulenburg, and over the public highway where it crossed the railroad at the point of collision; and also in failing to give the statutory signals while approaching said crossing. The defence is that the collision was the direct result of the negligence of the driver of the wagon, and Joseph Kutac, her husband, and that of herself, all of whom were in the same wagon, in failing and neglecting to see the approaching engine; and in driving on the crossing of the track, without keeping the lookout the law requires; and in not using the ordinary care and prudence required of persons attempting to cross a railroad at a public crossing. There was also a general denial of negligence by defendant, and a plea in bar of a former judgment against Joseph Kutac, father of plaintiffs, rendered in the district court of Fayette county on the same cause of action, and in favor of defendant. Proof in support of this plea was excluded. A judgment was recovered by plaintiffs for the sum of \$10,000 actual damages, as apportioned among them by the verdict.

Several errors are assigned for a reversal of the judgment, which will be considered without regard to the order of their presentation.

The petition alleged, as was also pleaded by defendant in bar of recovery in this action, that Joseph Kutac, the father of plaintiffs, and surviving husband of deceased, had previously sued the defendant upon the same cause of action in the district court of Fayette county, and in which suit a judgment was recovered against him by the defendant, and for this reason it was alleged in the

petition he was not joined as a plaintiff in this cause. In support of the defendant's plea that the plaintiffs were estopped from a recovery by this final judgment against Joseph Kutac, **Judgment in** certified copies of the proceedings in the district court **favor of** of Fayette county were offered in evidence, as was **plaintiff's** proof also that it was disclosed on that trial that the **father no bar.** plaintiffs herein were the surviving children of Mrs. Kutac, and were in existence. The defendant on the trial of this cause also requested an instruction to the effect that if Joseph Kutac had brought such a suit in a court of competent jurisdiction, and after a trial on the merits it terminated in a judgment in favor of defendant, and the proof therein showed the existence of the plaintiffs, and that they were the surviving children of the deceased, they would not be entitled to recover in this action. The evidence referred to was upon objection excluded, and the requested instruction refused. The defendant excepted, and assigns the ruling of the court as error. While it is true that the statute (Rev. St. art. 2899) authorizing the institution of suits of this character evidently intended that one suit should be brought, and although it has been so construed in several cases (*Railroad Co. v. Le Gierse*, 51 Tex. 199; *Dallas & W. R. Co. v. Spicker*, 59 Tex. 437), it was not intended by the statute, or the construction of it in the cases mentioned, that a person having a right of action under that statute should be precluded, or his rights in any manner affected, by a judgment to which he was not a party, in favor of the defendant, against one who might also have a right of action with such person.

If several persons having the right to sue would be concluded by a judgment to which they were not parties, against one having the right of action with them, the result would be that one would have the power to compromise and destroy the rights of all who could sue in the same action. There is nothing in this inconsistent with the rule that only one suit should be brought under the statute, and it is entirely within the defendant's power to require that only one such suit shall be brought. Where, as in the case tried in the district court of Fayette county, it was developed during the trial that the plaintiffs were then living, and were the surviving children of the deceased, and as such entitled to sue, the defendant, if it desired a judgment binding upon them, could have required them by a proper plea to be made parties plaintiff. Not having done so, he ought not to be heard now to insist that they are concluded by a judgment rendered in a suit to which they were not parties, and which he could have had them made parties to if he desired them bound by it. We think, therefore, that the plaintiffs in this case were not concluded by the judgment rendered in the suit, in the district court of Fayette county, brought by their father, Joseph Kutac, for himself only, and to which they

were not parties; and the court did not err in excluding the evidence offered, nor in refusing the instruction requested on this point.

But as the petition alleged the recovery of the judgment against him (Joseph Kutac) on the same cause of action on which the suits of the plaintiffs was founded, and as there was no controversy as to the fact that he was one of the parties having a right to sue under the statute for damages resulting from the death of Mrs. Kutac, the jury should have been instructed, in the event the plaintiffs were, under any circumstances, entitled to a verdict, that no damages sustained by Joseph Kutac, the surviving husband, if any were shown by the evidence, could be properly considered. The case called for such an instruction, we think.

Instruction to consider damages sustained by plaintiff's father necessary.

Appellant urges under his assignments that there is an entire failure in the evidence to show negligence in its employes which contributed to the collision, and claims that the testimony shows that it was solely caused by the reckless conduct and gross negligence of the driver, and those in charge of the wagon. As set forth in their petition, the right of plaintiffs to recover is predicated upon two distinct acts of gross negligence upon the part of appellant, charged to have been the direct cause of the collision, notwithstanding the exercise of proper care by their mother. Joseph Kutac, and the driver, all of whom were in the wagon. They say that the collision occurred at one of the most public crossings of a constantly used high-way; that "each of them used due care and prudence in their approach to the crossing, and neither of them by any act of negligence contributed to the collision." That at the time the train was being run at a dangerous and reckless speed; that no whistles were blown, bells rung, or other notice of the approach of the engine given, until so near the wagon that it was impossible for their mother, Kutac, or the driver to avoid it; and that appellant could have seen the wagon in time to have avoided it if its employes had used proper care, etc. If these allegations are supported by the evidence, unquestionably the plaintiffs would be entitled to a judgment.

Sufficiency of evidence to show negligence.

It cannot be insisted, we think, that there is any proof of the failure to give the statutory signals. The only testimony having any tendency to support this allegation is the evidence of the driver, Surcula, and that of Joseph Kutac, who testified by depositions to the effect "that they heard and saw no signals which should have been given by those in charge of the engine. The evidence of a number of witnesses, and all who witnessed the collision, is direct and positive that the whistle was blown repeat-

No proof of failure to give statutory signals.

edly on approaching the crossing, sharply, and by its peculiar and unusual sound attracted their attention. One of the plaintiffs' witnesses testifies to hearing it.

The evidence as to the rate of speed at which the cars were running at the time of the collision is conflicting. The witnesses testifying upon this point varied in their statements, ranging from 15 to 40 miles an hour. There is no controversy about

Evidence as to rate of speed. the fact that all the occupants of the wagon were well acquainted with the crossing, and had frequently travelled the road. On the day of the collision, Kutac

and his wife were in the town of Schulenburg. Having sent their own wagon home some distance in the country, and to avoid walking, they obtained the consent of Kaharnok to return in his wagon, which was driven by one Frank Surcula. From the description given by the witnesses of the public highway and the railroad, it appears that they run parallel with each other west from the depot at Schulenburg, the highway being north of and within about 40 feet of the railroad. It is about 900 yards from the depot to the place of the collision. The railroad is level, and does not curve between these points. There is a rise on the dirt road or public highway about 250 yards from the crossing. The railroad runs through this rise in what is commonly called a "cut." After reaching the highest point on this rise, there is nothing to prevent one from seeing a locomotive at any point on the track for at least 250 yards before reaching the crossing. This "rise" is evidently the elevated part of the road referred to by plaintiffs' witness, Surcula, as the place where he "looked to see if any locomotive was crossing from any direction," and seeing none, and hearing no signals, he drove on. About 50 feet from the crossing, the road running west changes its course, and, at a point known as "Oil-Mill Switch" crossing, turns south, and in crossing to the south side of the railroad it forms an acute angle or nearly so.

There was nothing to prevent the occupants of the wagon from seeing the engine coming from the depot at this point for a distance of 200 yards, and it was seen by all the witnesses who saw the collision, except Surcula and Joseph Kutac. The evidence

Contributory negligence—Failure to look for train. in the case shows that, by the exercise of that care and prudence which the law requires of those approaching a public crossing of a railroad, the occupants of the wagon could have seen the engine in time to have avoided the accident. That the driver and the husband of the deceased could have seen it we think there is no doubt from the facts. That the deceased Mrs.

Kutac also could have, by the exercise of the same care, seen the approaching cars, is evident, as it is also that she was familiar with the crossing. Several witnesses testify that the driver had sufficient time to have stopped his team, and have avoided the

collision. This fact is shown by his own evidence. Two wagons had crossed at the same place just ahead of him, and one was just in the rear of his wagon. Neither of these had any better opportunities for avoiding the collision than he had. There is much evidence showing that he drove his team at a recklessly rapid rate to the crossing, without keeping any lookout. The cause of the collision is ascribed by him to the fact that, "while he was on a more elevated road, he looked to see if a locomotive was coming from any direction. Seeing none, and hearing no signals, he drove onto the crossing, and the collision occurred." If the witnesses described correctly the railroad, highway, and surroundings, the point referred to by him as the "elevated road" was at least 250 yards from the crossing; and if this locality is as the entire evidence shows it to be, the occupants of the wagon could, by the exercise of ordinary care and prudence, have seen the engine, whether its speed was 5 or 40 miles an hour, and whether it did or did not give the statutory signals. Ordinarily, the fact that the customary signals were not made, does not relieve a person approaching an open crossing from the duty of keeping a proper lookout on approaching the road. And where a person knowingly, about to cross a railroad track, may have an unobstructed view of the railroad, so as to know of the approach of a train a sufficient time to clearly avoid any injury, he cannot recover, as a matter of law, although the company may have been negligent, or neglected to perform a statutory requirement. *International & G. N. R. Co. v. Graves*, 59 Tex. 331. In this case the signals were made, as the evidence shows. The rate of speed at which the train was moving is not shown by the testimony of the plaintiffs' witnesses to have been the proximate cause of the accident. As the driver and Kutac both state, the engine and wagon reached the crossing at about the same time; and the testimony of those in charge of the cars, which is not contradicted, is that when the wagon was at Oil-Mill switch, 50 feet from the crossing, the whistle of the engine was blown as a warning, and the air-brakes applied immediately on seeing that the wagon continued to approach the crossing, and that all the care was used that it appears could have been exercised by those in charge of the engine to avoid the collision.

Conceding, though, that a reasonable construction of the testimony justifies the conclusion that appellant's negligence, concurring with that of the driver, caused the collision, and accepting the American rule upon the subject of what is termed imputed contributory negligence of third persons, to the effect that his negligence should not be imputed to Mrs. Kutac, the result would be that in this case a recovery is had in the absence of any evidence whatever of ordinary care upon her part, and that,

**Imputed
contributory
negligence
of third
persons.**

too, under circumstances which show that, if such care had been exercised by her, the injury received might have been avoided. Although the circumstances surrounding her were such that she may not have been chargeable with the driver's negligence, they were such as required of her the exercise of ordinary care. The driver's negligence would not relieve her of this. There is no evidence tending to show that she would not have exercised this care; nor is it made to appear why it was not used under circumstances that might have prevented the injuries resulting in her death. The plaintiffs in this case cannot recover under a state of facts which, if she had survived, would not have entitled her to recover because of her want of ordinary care. In a suit brought by her, it would have been essential to show that she used the ordinary care which it is said a reasonably prudent person, similarly situated, under all the circumstances, would have exercised. Slight negligence, says a high authority, rejecting the artificial classifications and distinctions made on this subject, will not prevent a recovery, but the slightest want of ordinary care, contributing proximately to the injury, will do so. Beach, Contrib. Neg. 19, 20.

It was not disputed in this cause that Mrs. Kutac was well acquainted with the highway, the railroad and crossing, and had travelled it; and, although there was no evidence that she "aided, assisted, or controlled" the driver's movements, there was proof having a tendency to show acts of omission on her part,

Omission of injured person to exercise care. under all the circumstances, from which the jury might have found that she did not use the ordinary care which the law requires to be shown to authorize a recovery. What was the care a reasonably prudent person, similarly situated, would have used, and whether, under the facts disclosed by the testimony, she used this care, were proper questions to be submitted to the jury under appropriate instructions. It is well settled that a person, in approaching a point where a railroad track is crossed by a highway, must look up and down the track attentively, and a failure to do so is generally negligence. Knowing, as Mrs. Kutac did, the highway and crossing, the law made it her duty to keep a proper lookout for approaching cars; and, while the law does not hold her responsible for the negligence of a third person, it does impute her own to her. Whether she saw the engine, or by the use of ordinary care could have seen it, there being nothing to obstruct the view of the track, before reaching the crossing; whether, knowing the danger to which she was exposed, she remained voluntarily in the wagon,—were matters proper to be considered. The court, in substance, instructed the jury that, if the driver of the wagon was guilty of negligence, this would not prevent a recovery, if the negligence of the de-

fendant, and not the contributory negligence of Mrs. Kutac, caused her death, unless the jury believed she was assisting, advising, or controlling the driver in his actions, and thus contributed to her injury. As we have stated, we do not think the negligence of the driver was imputable to Mrs. Kutac, if she used ordinary care to avoid the injury. In so far as it announced that principle, the charge was correct.

It is opposed to the English rule declared in *Thorogood v. Bryan*, 8 C. B. 115, cited in *Beach, Contrib. Neg.* p. 108, that the negligence of the carrier contributing to the injury is imputed to the plaintiff. This rule appears to have excited much discussion and comment, and prevails in Pennsylvania, Iowa, Wisconsin, and probably other courts in a qualified form. It is rejected, however, by the weight of American cases, which hold that there is no privity between the passenger and the carrier, and that the latter's contributory negligence is not imputable to the former. Applied to private carriers, the rule is said to be that, if the relation of joint enterprise or of master and servant exists, then the negligence of one joint enterpriser or servant is imputable to the other joint enterpriser or to the master; but a mere guest, as in this case, is not a master or joint enterpriser, nor can the negligence of the host or his servants be imputed to the guest. *Gray v. Philadelphia & R. R. Co.*, 22 Am. & Eng. R. Cas. 355, and note.

**Rule in
Thorogood
v. Bryan.**

The court had, in another part of the charge, told the jury that plaintiffs could not recover if Mrs. Kutac could have prevented the injury by proper care and prudence. But this was followed by the instruction quoted, which made the want of ordinary care or prudence upon her part depend in this case upon acts of "assistance, advice, or control of the driver's actions which thus contributed to her injury." This was an incorrect standard of care—Erroneous instructions. The test the law applies, and which is well settled in a multitude of cases, is a want of ordinary care. In the application of this instruction to that part of the evidence, to the effect that the driver was whipping and urging his team at a rapid rate of speed, as if to reach the track and cross before the engine, the jury might have inferred that, unless she thus contributed to her injuries in the manner pointed out in the charge, plaintiffs should recover. There was no testimony whatever that she contributed in this way to her injuries. There was evidence from which the jury might have believed that her want of ordinary care contributed to them. We think the charge was calculated to mislead, and was erroneous. There was no error in refusing the instructions requested by the appellant, because they embodied the principle that the negligence of the driver is imputed to the passenger, which is not the law ap-

plicable to this case. Nor was there error in overruling the exception to the petition, in so far as it sought to recover damages in favor of John Kutac, who was alleged to have been more than 21 years old at the time of his mother's death. He was a surviving child of the deceased, and the statute makes no distinction upon this ground, in declaring who shall have the right to sue.

The counsel for plaintiffs in his opening arguments used this language in addressing the jury: "Gentlemen, these powerful railroad corporations will not do justice to any one unless compelled to do it. If they were to kill your horse to day, they would not pay you anything for it, but they would tell you to sue, and go to the court for your money, and then they would fight you with all their power. They will take any advantage of you they can, no matter how just your case. Now, I hope you will make them pay the last cent you can in this case for killing their mother." There is no evidence contained in the record authorizing these remarks. The court properly instructed the jury not to be influenced by them, but the finding of the jury "for the full amount sued for" indicates that this language was more effective than the courts instruction. *Galveston, H. & S. A. R. Co. v. Cooper*, 70 Tex. 67. For the reasons mentioned we are of opinion that the judgment should be reversed, and the cause remanded.

STAYTON, C. J.—Report of commission of appeals examined, their opinion adopted, judgment reversed, and cause remanded.

Crossings—Slackening Speed.—A city, authorized by its charter to make an order limiting the speed of trains approaching crossings within its boundaries, had not done so. At the time of the accident the train was running at the rate of from 35 to 40 miles an hour. It was *held* that the trial court erred in finding that it was the legal duty of the company to slacken the speed of its train. The court said: "As a general rule, negligence cannot be inferred from speed alone. In the case of *Warner v. Railroad Co.*, 44 N. Y. 465, the law is thus stated: 'The law places no restrictions upon the rate of speed at which the trains may be run across the country, at the crossings of the highways or elsewhere; nor is the train required to stop or reduce the speed at such places; nor does the law subject the railroad company to liability for damages occurring from the rate of speed, if the signals required by law are observed.' To the same effect are *Telfer v. Railroad Co.*, 30 N. J. Law 188, 192; *Railroad Co. v. Lee*, 68 Ill. 576; *Same v. Harwood*, 80 Ill. 88; *Grows v. Railroad Co.*, 67 Me. 100." *Dyson v. New York & N. E. R. Co. (Conn.)*, 17 Atl. Rep. 137.

The view of the crossing was intercepted for a distance of 200 feet on a highway, until the approaching train was within 60 feet of the crossing. The deceased, at the time of the accident, was driving an omnibus. The employes in charge of the train gave all the signals required by law, although the speed of the train was not slackened. *Held*, that the engineer was not guilty of negligence in failing to slacken the speed of his train, nor was the company guilty of negligence in not providing at the crossing additional signals to those required by statute. The omnibus, approaching the crossing, was seen by the fireman. The distance from the crossing when the omnibus was seen was not found distinctly, but it appeared inferentially that it was at least 200 feet. The train was 600 feet from the crossing at that time. *Held*, that as deceased was not so near

the crossing as to impress the fireman with a sense of his danger, the latter was not guilty of negligence in failing immediately to inform the engineer. *Dyson v. New York & N. E. R. Co. (Conn.)*, 17 Atl. Rep. 137.

Imputed Negligence.—See *New York, P. & N. R. Co. v. Cooper's Adm.*, *ante*, p. 33; *Hoag v. New York Cent. & H. R. Co.*, *post*.

HOAG

v.

NEW YORK CENTRAL AND HUDSON RIVER R. CO.

(*New York Court of Appeals, November 27, 1888.*)

Crossing—Imputed Negligence—Province of Jury.—In an action by an administratrix to recover damages for the death of her intestate, it appeared that the deceased was driving with her husband at the time of her death. At a crossing the passenger and freight tracks were 70 feet apart. The husband, when approaching the freight tracks, stopped his horse when 100 or more yards away, and then again within 15 feet of the crossing, because of the passage of a freight train which obstructed the road. When that had passed he crossed the freight tracks, and, in an endeavor to cross the passenger track, was struck by the train and both he and the intestate were killed. *Held*, that as the negligence of the husband, who was driving, could not be imputed to the deceased, the question whether there was any evidence tending to show that she was free from negligence contributing to the injury, must be submitted to the jury.

APPEAL from General Term, Supreme Court, Third Department.

Action by Isabella C. Hoag as administratrix of Rebecca M. C. Herrick, deceased, against the New York Central and Hudson River R. Co. to recover damages for negligently causing the death of plaintiff's intestate. Plaintiff appeals from a nonsuit by direction of the court.

C. L. Stedman for appellant.

Hamilton Harris for respondent.

FINCH, J.—The husband and wife were both killed by collision with a passenger train while attempting to cross the defendant's track at a crossing known as "Fuller's Lane." The husband was driving, and his wife—for whose death **Facts.** this action was brought—was riding with him on the way to their home. At this crossing the passenger and freight tracks were 70 feet apart. To the deceased and her husband, who were approaching from the north, the freight tracks were the first to be crossed. At that crossing, and all the way to the passenger tracks, a train upon them was visible, without anything to obstruct or hinder, for a distance of at least one, and possibly of two, miles. The husband, when approaching the freight tracks,

stopped his horse when a hundred or more yards away, and then again within fifteen yards of the crossing, because of the passage of a freight train which obstructed the way. When that had passed, they crossed the freight tracks in its rear, and in an endeavor to cross the passenger tracks were struck by a train, and killed. Nothing is known of the manner of the accident, except that the horse was seen jumping to get across, and did, in fact, escape. On this state of facts, the plaintiff was nonsuited, and that judgment affirmed by the general term.

If we assume, for the purposes of the argument, the negligence of the husband, who was driving, yet his negligence cannot be imputed to the wife. *Platz v. Cohoes*, 26 Hun 391, affirmed 89 N. Y. 219; *Robinson v. New York Cent. & H. R. R. Co.*, 66 N.

Imputed Y. 11. The question presented as to her is whether
contributory there was any evidence tending to show that she was
negligence— free from negligence contributing to the injury. The
Duty of facts and circumstances proven admit of two conflicting
persons inferences, one or the other of which must be true.
injured. The deceased and her husband either saw the passenger train approaching as they neared the track, or they did not. If they did not see it, or, at least, the

deceased did not see it, she was negligent; for she was bound to look and listen; and the facts show that if she had looked she could have seen and would have seen the approaching train. She had no right because her husband was driving to omit some reasonable and prudent effort to see for herself that the crossing was safe. But the strong probability is that she did see the train, and her husband did also, and that he for some reason undertook to cross in its front, miscalculating, perhaps, its distance and speed, and his opportunity. She was not bound to suspect that purpose until she saw it being executed. Before that, she might reasonably expect him to stop and wait. When she saw that he was about to make the attempt, they must have been very close to the track. She was not bound to jump from the wagon. That might seem to her as dangerous as to sit still. She could not be required to seize the reins, or interfere with the driver. That is almost always dangerous and imprudent. She might have begged her husband to stop, and we do not know that she did not; but, if she did not, and sat silent, it does not follow, as matter of law, that she was negligent. Her husband seemed to have been ordinarily, a careful man. Having his wife with him, one would think would make him more so. He stopped twice before he crossed the freight tracks. She was hardly blamable, when both saw the coming train, for thinking and expecting that he would stop again. When she saw that, instead of that, he meant to cross, she should have spoken, perhaps; but she may have been so near the engine as to have scarcely had time, or so paralyzed with fright at the

impending danger as to have lost her judgment and prudence for the moment. The degree of care to be exercised varies with circumstances and emergencies. If the deceased was silent, it does not follow, as matter of law, that she was negligent. Which of the two inferences we have named should be drawn, and, if the latter, whether the surrounding circumstances sufficiently show that the deceased was not in fault, were questions which we think should have gone to the jury.

The judgment should be reversed, and a new trial granted, costs to abide the event.

All concur, except EARL and GRAY, JJ., not voting. PECKHAM, J., not sitting.

Imputed Negligence.—See *New York, P. & N. R. Co. v. Cooper's Adm.*, *ante*, p. 33; *Galveston, H. & S. R. Co. v. Kutac*, *ante*, p. 479.

CENTRAL RAILROAD CO.

v.

RAIFORD.

(*Georgia Supreme Court, March 18, 1889.*)

Crossings—Statutory Signals—Trespassers on Track.—The statutory diligence required touching the use of the bell or whistle, and touching checking of trains, on approaching public crossings, is exacted primarily for the benefit of persons crossing the track, and not for those walking along it, yet relatively to the latter, as well as the former, a failure to comply with the statute is evidence of negligence to be considered by the jury.

Same—Degree of Care.—Ordinary care, by one crossing a railway upon a public crossing, is not the measure of ordinary care for one using the track to walk upon, although at the moment he may be at or on such a crossing. One who undertakes to make a passway of a railroad must use that degree of diligence which every prudent person uses who puts himself unnecessarily in a perilous situation. The evidence in the record strongly indicates that, had the injured party come up to this measure of diligence, he could and would have avoided the consequences to himself of the negligence of the company; and a new trial is ordered on this question alone, with direction to render judgment for the amount already assessed, or dismiss the action, according as the finding of another jury may be in the affirmative or the negative touching this one question.

ERROR to Superior Court, Sumter County.

Lyon & Estes and *E. A. Hawkins* for plaintiff in error.

Guerry & Son and *B. P. Hollis* for defendant in error.

BLECKLEY, C. J.—Raiford obtained a verdict for \$1,500 damages against the railroad company for a personal injury, and a motion

for a new trial by the company was denied. The injury resulted in the loss by Raiford of one hand and part of one foot.

Facts. We are satisfied that the damages were assessed upon the theory that both parties were negligent. That theory is well warranted by the evidence. The injury occurred at a street crossing, and Raiford was stricken while upon the crossing or very near to it; but he was not using the highway for the purpose of crossing the railroad, but was using the track for the purpose of walking along it. It was late at night. He had already passed up the railroad for some distance, and had stepped off the track to allow a freight train to pass. He then returned to it and continued to walk along it, although he knew that another freight train was behind, and would probably soon overtake him. The only explanation he gives why he was not looking out was that he expected that train to "drill" at the station. He says it came upon him unawares, and he did not discover its approach until it was within some four feet. He then attempted to leave the track, but was too late. It struck him and inflicted the injury. Whether he was then upon the crossing or slightly beyond it is uncertain, but in either case there was negligence on the part of the railroad employes, under sections 708-710 of the code, in failing to ring the bell and check the train.

While these measures of statutory diligence are intended for the protection of persons crossing the track, and not for those walking along the track, yet relatively to the latter, as well as the former, a failure to comply with the statute is evidence of negligence to be considered by the jury. *Georgia R. v. Williams*, 74 Ga. 723. Looking at the whole charge of the court as we find it set out in the record, there was no error committed either in the instructions given, or by refusing to instruct as requested. So far as requests were legal, they were substantially embodied in the main charge.

2. We should affirm the judgment refusing a new trial without hesitation were it not that, according to any view we can possibly adopt with reference to ordinary diligence on the part of Raiford, we are unable to see how it could have failed to protect him against the consequences of the company's negligence. On the part of the company there seems to have been no negligence whatever except in failing to ring the bell and check the train, as required by the statute. With knowledge that the train was behind, and was soon to pass along the track, Raiford, while walking along the track in front of it, was bound to come up to that measure of diligence which a prudent person would have exercised for his own safety under like circumstances. He may have exercised that degree of care which such a person would have

**T. espessors
on track—
Duty to
ring bell.**

**Contributory
negligence—
Failure to
use ordinary
diligence.**

used in crossing a railroad upon a public crossing, but that would not suffice; for one who walks upon a railway track, using and intending to use it as a passway, not only at the crossing but on both sides, must be much more on the alert than when he merely attempts to cross from side to side of the railroad. The train was a heavy freight train, going slowly up grade, and it seems to us that if Raiford had given even slight attention to the perils of his situation, he would have discovered the approach of the train in time to protect himself. He must have been not only negligent, but grossly negligent, to have been run down by such a train under the circumstances. *Central R. & B. Co. v. Smith*, 78 Ga. 694. We fully recognize it as a question of fact, and not of law, whether by the use of ordinary diligence he could have avoided the consequences to himself of the company's negligence. But it is our duty, on a motion for a new trial, which complains that the verdict is contrary to the evidence, to form our own opinions upon such a fact; and, where they are so decided as in the present case, it is our duty to give effect to them by ordering a new trial. But we shall confine the new trial to the single question, and direct that such trial be had for the sole purpose, of ascertaining by the verdict of another jury whether Raiford could, by the use of ordinary diligence, have avoided the injury. If he could, and the jury so find, we direct that the action be dismissed. If he could not, and the jury so find, we direct that judgment be entered up in his favor for the amount assessed by the former jury to wit, \$1,500, with interest thereon from the date of the previous verdict.

Reversed, with direction.

Crossings—Who Entitled to Benefit of Statutory Signals.—See 4 Am. & Eng. Encyc. of L. 927.

BAILEY

v.

HARTFORD AND CONNECTICUT VALLEY R. CO.

(Connecticut Supreme Court of Errors, July 7, 1888.)

Crossings—Signals—Frightening Horse—Parallel Highway.—When a railroad is laid out parallel to and near a highway, the company has authority to operate its road in the usual and ordinary way, including the right to give the usual and proper signals of danger, as by the sounding of whistles or the ringing of bells, and it is not liable for injuries caused through the frightening of a horse by a whistle sounded by a train approaching a grade crossing.

Same—Signals—Negligence.—The Connecticut statute directs that the engineer of the train shall, within 80 rods of any grade crossing, sound the whistle or ring the bell. By reason of curves in a railroad and high bluffs on either side, the

signal when given at a distance of 80 rods from a crossing was not likely to be heard by persons near the crossing. A whistling post was therefore erected at a distance of 45 rods from the crossing, in a place much more favorable to the hearing of the signal. *Held*, that as a signal given at the whistling post in a proper manner was given at the place where it would have the most effect, such act was not the negligence on the part of the engineer, and that the fact that on the night of the accident the signal could have been heard at the crossing although given at a distance of 80 rods did not affect the engineer's act.

APPEAL from Superior Court, Hartford County.

Action by Leonard Bailey against the Hartford & Connecticut Valley R. Co. to recover damages for personal injuries. Defendant appeals from a judgment for the plaintiff.

H. C. Robinson and *S. A. Robinson* for appellant.

S. L. Warner and *M. E. Culver* for appellee.

ANDREWS, J.—A highway runs parallel with and near to the defendant's railroad track for about three-fourths of a mile at a part of its road two or three miles south of the city of Middletown. A passenger train, moving northerly at the rate of 30 or 35 miles an hour along that part of the railroad, sounded its whistle as a signal of its approach to a grade crossing. The whistle was sounded in a reasonable manner, and at the regular whistling post, about 45 rods south of the grade crossing. The whistling post had been at the same place for 20 years. Southerly from the post there was a sharp curve in the road, and on its westerly side a high bluff, from 60 to 75 feet high. The post was set up and kept at that place for the reason, assigned by the defendant, that because of the curve and the bluff a signal given there was more effective and reliable, and more likely to be heard at the grade crossing, than if given 80 rods away. The train did not whistle at the point 80 rods from the crossing. The plaintiff was travelling on the parallel highway, going north, and was at a point about 35 rods south of the grade crossing when the whistle sounded. He had a horse of ordinary gentleness, and was driving with ordinary care. His horse was frightened by the whistle, ran, and threw him out on the ground, and he received the injuries thereby which are complained of in this action. It was in the evening, and it was dark and raining. The engineer of the train was watching the track, and looking out for the grade crossing, and he did not see the plaintiff. His attention was directed to the track alone, and he was not looking to see if any one was travelling on the highway.

The superior court found that "the whole distance which the highway runs parallel to the railroad is made dangerous to travelers by the proximity of the railroad to it, and that part of it where the accident happened is especially so, particularly in the evening, when it is dark and stormy, and at such a time requires of the managers of railroad trains more than ordinary caution and

care that persons travelling with teams on the highway do not have their horses unnecessarily frightened, and themselves injured in consequence." Having laid down this as the rule of duty incumbent upon the defendant at that time and place, that court found the defendant "guilty of negligence in giving no signal of the approach of its train 80 rods from the grade crossing, and in fact giving notice by whistling at the post; and that reasonable care by the defendant under the circumstances required it to have given a signal, by whistle or otherwise, eighty rods from the crossing, and to have occasionally rung its bell, and not blown its whistle along the line of the parallel highway, until the crossing was reached." And thereupon the court rendered judgment in favor of the plaintiff for substantial damages. The defendant has appealed to this court.

The law requires the managers of railroad trains the utmost possible care for the safety of their own passengers. A section of the statutes directs with particularity what the engineer of a train must do when approaching a grade crossing. These are duties of the very highest nature. The duty which such managers are under to persons travelling with teams on a highway is a limited one at the most, and one that should never be permitted to interfere in the slightest degree with the higher duty they owe to their own passengers, and to persons upon grade crossings. Under no circumstances are they required to exercise more than ordinary caution and care towards persons travelling on a highway. And in so deciding the superior court required of the defendant that which the law does not require. A highway cannot be laid out within 300 feet of a railroad except upon the approval of a judge of the superior court. A railroad cannot be located except upon the approval of the railroad commissioners. When a railroad is located near to a highway, and the location is approved by the railroad commissioners, or when a highway is laid out within the prohibited distance of a railroad, and the lay out has been approved by a judge, such approval, in either case, implies the adjudication upon the question of danger to travellers on the highway by reason of trains on the railroads. After having such an approval of its location, a railroad company has authority to operate its road in the usual and ordinary way, including the right to make all the noises incident to the working of its engines and cars, and also the right to give the usual and proper signals of danger, as by the sounding of whistles, or the ringing of bells; and, while exercising such rights in a reasonable manner, the railroad company is not liable for injuries occasioned by horses, when being driven on a highway, taking fright at such noises. The whistle which frightened the plaintiff's horse was a signal that the train was approaching a grade crossing. There was

**Duty of
railroad
company to
persons
travelling
on highways**

no claim but that the whistle was sounded properly for that purpose. The statute (Gen. St. § 3554) directs that the engineer of every train shall within 80 rods of any grade crossing sound the whistle or ring the bell. This is required that all persons who are about to cross the track at the grade crossing may have notice that the train is coming. Obviously, such notice should be given at such place and by such means as will be the most likely to accomplish the object which the statute has in view. That the whistle is the more effective means of warning than the bell is established by common knowledge, as well as by an almost universal usage. So uniform, indeed, is this usage, that an omission to sound the whistle, except at a place where the railroad commissioners had authorized the whistle to be omitted, even if the bell was rung, would undoubtedly be regarded as negligence. If by reason of curves in the railroad, or by reason of high bluffs on either side, the signal, when given at a distance of 80 rods from the crossing, is not likely to be heard by persons near the crossing, but when given at a distance of 45 rods is certain to be heard by such persons, then, by every rule of good sense, the signal, if to be given but once, should be given at the latter distance, and not at the former. To argue the other way is a plain "sticking in the bark." The finding upon this part of the case is as follows: "Immediately below the whistling post is a sharp curve in the track, and on the westerly side of it a steep bluff from sixty to seventy five feet high, which somewhat, and in certain conditions of the atmosphere, considerably tends to obstruct and interrupt the passage of the sound of trains coming from the south." Taken in connection with the successful use for 20 years by the defendant of the 45 rods distance, this makes a very strong affirmative case that the signal when given there is much more likely to be heard at the grade crossing than when given at the 80 rods distance. The finding continues: "But it did not appear on the night in question that the signals required by law could not have been heard at the grade crossing if they had been given at 80 rods below." It is sufficient just here to say that this may be no more than a statement that there was an absence of evidence on the point. We will recur to it further on.

The defendant's engineer gave a signal required by law. He gave it in a proper manner, by the most efficient means, and, so far as appears, at the place where it would have the most effect. To call such an act, when done in such a manner, negligent, seems a misapplication of terms. It was claimed upon the argument by the defendant's counsel,—and apparently with confidence,—that, had the engineer omitted to give this very signal he would have exposed himself to a criminal prosecution, and to a fine of not less than \$10. Gen. St. §§ 3554, 3557, 3607. This is a view of the case

**Negligence
in giving
signals.**

which we have not found it necessary to consider. Negligence has been defined by this court to be a failure to perform some act required by law, or doing the act in an improper manner. It is certain that the act of the engineer does not come within this definition. The recent case of *Lamb v. Old Colony R. Co.*, 140 Mass. 79, was as follows: The plaintiff was driving his horse along a highway parallel to and adjoining the defendant's railroad; his horse was frightened by the smoke from the engine of a passing train, and the plaintiff was injured in consequence. The smoke which frightened the horse was occasioned by "firing up" the engine,—that is, mending the fire, or adding fuel to it,—the ordinary effect of which is to cause the emission for a short time of very black, dense smoke from the smoke stack. The contention of the plaintiff was that it was practicable to run the train for the whole distance where the railroad adjoined the highway, without firing up, and that the act of firing up on the stretch of railroad adjoining the highway was unnecessary for the ordinary running of the train, and exposed travellers to an unnecessary danger. There was no evidence in the case that the persons managing the train knew that the plaintiff was on the highway, but there was evidence that they would have seen him if they had been on the lookout for travellers on that part of the highway; and the plaintiff, on this part of the case, contended that the defendant was negligent in not observing him, and avoiding firing up when it would endanger him. Upon these facts and claims the court said: "The lawfulness of the act cannot depend upon whether a traveller happens to be at such a distance from the engine that he will not be endangered by the smoke caused by it, or in such a position that he cannot be seen by the fireman or engineer. If it is their duty to see one traveller outside the location of the railroad, it is their duty to see how many travellers there are, and to observe the position, direction and speed of each, the speed of the engine, the state of the atmosphere, the direction and force of the wind, the character of the coal used, and other circumstances which may determine whether all travellers are and will continue to be, until the smoke is dissipated, in such a position that their horses will not be affrighted by it. Being under no obligation to watch for travellers, the defendant could not have been guilty of negligence in not seeing and avoiding the plaintiff."

We come back now to the language of the finding before quoted, that "it did not appear on the night in question that the signals required by law could not have been heard at the grade crossing if they had been given eighty rods below." The judgment rendered makes it probable that the court regarded this as equivalent to a positive finding that on the night in question the signals required by law could have been heard at the grade crossing if they had been given 80 rods below, and that consequently

the engineer was negligent on that night in not sounding the whistle at that distance from the crossing. If this is correct, then upon some other occasion, when the conditions were such that the signals required by law could not be heard at the grade crossing if given 80 rods below, the engineer would be negligent if he should give them at that distance, and omit to give them at the whistling post; and thus the duty of the engineer to give or not to give the signals required by law at the whistling post would be made to depend upon the direction and force of the wind, the degree of moisture in the air, the electrical condition of the atmosphere, or some one or all of the circumstances which affect the transmission of sound. These are conditions many, and perhaps all, of which are liable to change almost every moment, and which it would be wholly impracticable for the engineer of a railroad train to ascertain beforehand. Indeed, it is very questionable whether there is any human knowledge by which these conditions and changes can be predicted with any such certainty as to make them available in the management of railroad trains. It would be clearly unjust to hold an engineer to be guilty of negligence for being ignorant of those things which the highest skill has hitherto failed to discover.

There is error in the judgment of the court below. The other judges concurred.

Statutory Signals.—Frightening Horses.—A statute requiring the whistle to be blown and the bell to be rung when approaching a highway crossing is intended for the protection of persons who do not intend, as well as for those who intend to use the crossing; and if, through a failure to give the signals, a traveller approaches so near the track that his horse is frightened by the passing train, the company is liable. *Ransom v. Chicago, St. P. M. & O. R. Co.*, 19 Am. & Eng. R. R. Cas. 16; *People v. New York Cent. R. Co.*, 13 N. Y. 78, aff'g. 25 Barb. (N. Y.) 199; *Wakefield v. Connecticut & P. R. Co.*, 37 Vt. 330; *Pennsylvania R. Co. v. Barnett*, 59 Pa. St. 259; *Pollock v. Eastern R. Co.*, 124 Mass. 158; *Norton v. Eastern R. Co.*, 113 Mass. 366; *Prescott v. Eastern R. Co.*, 113 Mass. 370; *Texas & Pac. R. Co. v. Chapman*, 57 Tex. 75; *Strong v. Placerville R. Co.*, 8 Am. & Eng. R. R. Cas. 273; *Grand Trunk R. Co. v. Rosenberger*, 9 Can. Sup. Ct. 311, s. c. 19 Am. & Eng. R. R. Cas. 8, aff'g. 8 Ont. App. 482, 15 Am. & Eng. R. R. Cas. 448. But see *Flint v. Norwich & W. R. Co.*, 110 Mass. 222.

But the statute imposes no obligation to give warning to persons who are merely travelling on a parallel road without any intention of crossing. *East Tennessee V. & G. R. Co. v. Feathers*, 10 Lea, (Tenn.) 103; s. c., 15 Am. & Eng. R. R. Cas. 446. And a person who has tied his team to a hitching post near the railroad cannot claim damages for injuries to his horses caused by their being frightened by an approaching train, which failed to give the statutory signals; the company owed the plaintiff no duty under such circumstances, *St. Louis & S. F. R. Co. v. Payne*, 13 Am. & Eng. R. R. Cas. 632.

The duty of complying with the statute only exists while the cars are approaching the crossing, and a complaint which is so framed as to admit the inference that the failure to signal occurred after the cars had passed the crossing is bad on demurrer. *Wilson v. Rochester & S. R. Co.*, 16 Barb. (N. Y.) 167.

It is not negligence to ring the bell when approaching a crossing unless it is done wantonly. *Morgan v. Norfolk Southern R. Co.*, 98 N. C. 247.

Horses Frightened by Negligent Management of Engine.—See *Billman v. Indianapolis C. & L. R. Co.*, 76 Ind. 166, s. c., 6 Am. & Eng. R. R. Cas. 41, note 49.

A railroad company has the right to make such noises as are necessarily incident to the running and reversing of its engines; and a person injured through the frightening of his horse while approaching a crossing cannot recover except unnecessary noise was made in the use of the engine after the engineer saw plaintiff approaching. *Morgan v. Norfolk Southern R. Co.*, 98 N. C. 247.

If an engine is negligently stopped at a crossing, and steam is negligently allowed to escape from it, the company is liable for injuries to a horse which is being lawfully driven along a public road for the purpose of crossing the track, and which is frightened by the steam. *Louisville & N. R. Co. v. Schmidt*, 8 Am. & Eng. R. R. Cas. 248. But it is contributory negligence precluding recovery for a person in charge of a horse to attempt to take it across a track in front of a stationary engine emitting steam, after it has become frightened. *Louisville & N. R. Co. v. Schmidt*, 8 Am. & Eng. R. R. Cas. 248; *Union Pac. R. Co. v. Hutchinson*, 39 Kan 485.

Negligent Act of Flagman.—A flagman signaled plaintiff to drive over the crossing. Just as he reached the track the flagman to avoid a collision with an approaching train, called to him to stop and nodded his flag up close in front of the horse. The horse became frightened and upset the buggy, injuring plaintiff. *Held* that it was for the jury to say whether plaintiff was guilty of contributory negligence in failing to observe the approaching train. *Buchanan v. Chicago M. & St. P. R. Co.*, 35 Am. & Eng. R. R. Cas. 378.

Failure to Fence.—Where plaintiff was driving on a highway beside a railroad track, and his horses becoming frightened by a passing train, ran upon the track and were injured, the question whether the failure of the company to fence the track was the proximate cause of the injury was properly left to the jury. *Maher v. Winona & St. P. R. Co.*, Am. & Eng. R. R. Cas. 572.

Action for Penalty.—A suit for the benefit of a person injured through his horses being frightened when approaching a crossing by a train running at an unlawful speed, may be maintained for the statutory penalty, although there was no actual collision. *Chicago & E. I. R. Co. v. People*, 120 Ill. 667, see also *Grand Trunk R. Co. v. Rosenberger*, 9 Can. S. C. 311, s. c., 19 Am. & Eng. R. R. Cas. 8, aff'g. 8 Ont. App. 482; 15 Am. & Eng. R. R. Cas. 448.

Evidence—Similar Occurrences.—See *Brown v. Eastern & M. R. Co.*, *post*.

WESTERN AND ATLANTIC R. CO.

v.

YOUNG.

(*Supreme Court of Georgia, November 9, 1888.*)

Damages—Interest—Discretion of Jury.—Interest at the legal rate cannot be added by the jury, in their discretion to discretionary damages awarded by them for a personal injury. Only special damages, computable upon direct or indirect evidence of actual values, can be thus increased.

Crossing—Negligence of Child—Degree of Diligence.—Due care for its own safety in a child nine years of age is such care as its capacity, mental and physical, fits it for exercising in the actual circumstances of the occasion and situation. Neither the average child of its own age, nor the prudent man, is a standard by which to measure its diligence with legal exactness. Such care as the capacity of the particular child enables it to use, naturally and reasonably, is what the law requires.

Same—Negligence—Violation of Ordinance—Flagmen—Reasonableness.—It is negligence, as matter of law, for railway companies not to use the precautions

for safety at public crossings definitely prescribed by statute or valid municipal ordinance. The existence of an ordinance, however, is matter of fact to be referred to the jury; the court cannot notice it judicially. Such an ordinance, regulating speed of trains, and requiring flagmen or watchmen to be kept at crowded crossings, may be passed and enforced by a city under the general grant of police powers usually found in municipal charters. No unreasonable ordinance can be valid.

Damages—Measure—Child—Province of Jury.—For a personal injury to a child nine years of age, including deprivation of a member, the law furnishes no measure of damages other than the enlightened conscience of impartial jurors, guided by all the facts and circumstances of the particular case. Among the results of the injury to be considered are pain and suffering, disfigurement and mutilation of the person and impaired capacity to pursue the ordinary avocations of life at and after attainment of majority.

ERROR to City Court of Atlanta.

Julius L. Brown for plaintiff in error.

Smith, Hoke & Burton for defendant in error.

BLECKLEY, C. J.—The plaintiff below, a boy nine years of age, obtained a verdict for \$10,000 for personal injuries received on a public street crossing in the city of Atlanta, by reason of being thrown down and run over by the cars of the railway company; his chief injury being the loss of his right arm, which had to be amputated above the elbow. The company moved for a new trial upon forty grounds, all of which were overruled.

1. The last ground of the motion complains of the charge of the court to the effect that the jury might, in their discretion, award, upon discretionary damages, further damages in the nature of interest computed at 7 per cent. from the date of the injury to the time of trial. This instruction was error. There is no authority of law for treating the jury as clothed with a double discretion,—a discretion to be exercised, first, in fixing the amount of the plaintiff's damages, and then in augmenting that amount by an assessment, in the nature of interest, for detention of the money or delay of payment. As long as the principal sum was not only unascertained, but unascertainable, save by the enlightened conscience or impartial jurors, the law neither appointed a day of payment, nor exacted any tender. The privilege of tendering by guess, given by statute in section 3056 of the Code, is not granted as a resource to shun or stop interest, but to avoid cost. As far back as 1799, we have statutory evidence adverse to the policy of increasing verdicts on account of interest upon unliquidated demands. *Cobb, Dig. 495*. It was thought consistent with this statute to increase the damages in trover by the addition of interest on the value of the property from the time of conversion. See *Collier v. Lyons*, 18 Ga. 648, and other cases. So, in *Georgia R. etc. Co. v. Garr*, 57 Ga. 280,

**Statement
of facts.**

**Interest upon
discretionary
damages
cannot be
awarded.**

the power of the jury to add interest in computing damages recoverable by a widow for the homicide of her husband is tacitly recognized. And in *Railroad Co. v. Sears*, 66 Ga. 499, there is apparently a like recognition of the power, while the direct adjudication was that it was not obligatory as a duty. To the same effect, perhaps, is *Western & A. R. Co. v. McCauley*, 68 Ga. 818, where the action was for killing a bull. But in all these cases the damages recoverable were special, and had to be proved by evidence applying directly or indirectly to values; while in the present case there is no such evidence, and the entire recovery is for damages of a nature incapable of any standard of measurement external to the minds and consciences of the jury. In this respect, though they are not punitive, all claim to punitive damages having been renounced at the trial, they are as indefinite and indeterminate in their elements as are damages of that class; consequently the case of *Rattaree v. Chapman*, 4 S. E. Rep. 684, (decided last term,) which holds that the jury should not be instructed that they are authorized to add interest in assessing damages, where punitive damages can be allowed, rules this case. In principle, the two cases are one and the same. To add interest to discretionary damages is to multiply uncertainty by certainty; the indefinite by the definite; a mixture of incongruous elements which subjects one of the parties to the burden, and gives the other the benefit of both kinds. If the time of realizing discretionary damages is to be considered, (and doubtless the jury may consider it,) it should be left as one of the terms of the general problem of damages, unfixed like all the rest of the terms. The rate of interest, as established by law, has no relevancy to the matter. Sums ascertainable only by the enlightened conscience of impartial jurors do not bear interest before verdict, either as interest or as damages, with or without discretionary allowance by the jury.

2. The cars which hurt the boy were being switched, in the heart of the city, from the premises of one railroad company to those of another. They were running backwards. The boy was passing along a street which divided the premises of the one company from those of the other, and which crossed eight parallel tracks. He was upon the sidewalk. His diligence in looking out for danger was and is a main point in the merits of litigation. The court charged (twenty-fourth ground of the motion) that "ordinary diligence is that degree of care and attention which ordinarily reasonable and prudent persons would use under the same or similar circumstances. If the plaintiff was a child of tender years, it would be that degree of care and attention which a child of average powers and capacity, of the same age, would use under the same or similar circumstances." The objections to

Ordinary
diligence
of child of
tender
years.

this charge, as indicated in the motion, are that the court should have used "men" instead of "persons," and that it was otherwise illegal. We do not go back to the reported cases to see whether the care of "ordinarily reasonable and prudent persons" is equivalent to the care of "every prudent person," but we suggest that the standard of ordinary care, under our law, is the care of every prudent man, and not of the average or ordinary prudent man or person. In *Beach, Contrib. Neg.* § 9, p. 23, mention is made of the ideal average prudent man, whose conduct theoretically is a constant; but we prefer to look for a standard to the real man, the prudent man, and to exclude the average altogether from the test. When the class prudent has been reached, every individual of the class ought to be considered prudent, and there is no occasion to invent an average ideal man to represent the class. "A prudent man foreseeeth the evil, and hideth himself," I have examined the cases cited by Mr. Beach with reference to averaging the class "prudent," except *Walsh v. Oregon R. & Nav. Co.*, 10 Or. 250, and in only one of them (*Coates v. Canaan*, 51 Vt. 138) do I find average treated directly as an element in defining ordinary care.

But, conceding that average may serve as a standard in adults, it will not follow that a like standard should have recognition as to children. Could we assume an ideal constant as to the former, who that knows how precocious are some children, and how backward are others, would carry the assumption down to childhood, and apply it to children? Capacity (which includes personal experience as well as natural gifts) is the main thing. Age is of no significance, except as a mark or sign of capacity. Some of the decisions mention age only, but most of them couple capacity with it: As specimens, see *Lynch v. Nurdin*, 1 Adol. & E. (N. S.) 29; *Washington & G. R. Co. v. Gladmon*, 15 Wall. 401; *Sioux City & Pac. R. Co. v. Stout*, 17 Wall. 657; 2 Am. & Eng. R. R. Cas. 645; *Munn v. Reed*, 4 Allen 431; *Mobile & M. R. Co. v. Crenshaw*, 65 Ala. 566; 8 Am. & Eng. R. R. Cas. 340; *Byrne v. New York Cent. etc. R. Co.*, 83 N. Y. 620; 6 Am. & Eng. R. R. Cas. 617; *Plumley v. Birge*, 124 Mass. 57; *Dowd v. Chicopee*, 116 Mass. 93; *Lynch v. Smith*, 104 Mass. 52. The study of these and other like cases will lead to two conclusions: First, that no court can hold that childhood and manhood are bound to observe the same degree of diligence; secondly, that, while the name "ordinary care," is frequently applied to the diligence exacted by law of a child, there is little propriety in doing so,—due care is always the better and more accurate description. Certainly "extraordinary care," in any proper sense of the term, can never be exacted of young children; and slight diligence would often be due care on their part, when

**Average
intelligence
not standard
in case of
children.**

in adults it would be gross negligence. The comparative degrees, extraordinary, ordinary, and slight, it seems to us, cannot be fitly applied to children in reference to measures to be observed by them for their own security. If such an application was suggested by *Vickers v. Atlanta & W. P. R. Co.*, 64 Ga. 306; 8 Am. & Eng. R. R. Cas. 337, it was an inadvertence, not in what was said but in what was implied. Due care on the part of this boy might fall far short of that of a prudent man, and yet exceed that of average boys of his own age. According to the evidence as to his standing at school, he was much above the average of his class.

3. As to the charge of the court touching negligence as matter of law, the application of the statute and of the city ordinance, the duty to ring the bell and hold trains in check so as to stop them at street crossings, the duty to comply with the ordinance as to the speed of trains not stopped, and as to keeping watchmen or flagmen at certain crossings, and as to responsibility of the railroad companies for inattention or negligence by such flagmen or watchmen, (in respect to all which, see twenty-fifth, twenty-sixth, twenty-eighth, thirty-first, thirty-third, thirty-fifth grounds of the motion,) we have little fault to find. On these subjects we merely refer to cases already adjudicated. *Atlanta & W. P. R. Co. v. Wyly*, 65 Ga. 120; 8 Am. & Eng. R. R. Cas. 262; *Central R. & Banking Co. v. Smith*, 78 Ga. —; 34 Am. & Eng. R. R. Cas. 1; *Georgia R. Co. v. Carr*, 73 Ga. 557; *Western & A. R. Co. v. Meigs*, 74 Ga. 857; *Central R. Co. v. Russell*, 75 Ga. 810. We see no reason to doubt that a city which is the terminus of numerous connecting railways, and which interchange business within the corporate limits, may, by virtue of the usual grant of police powers found in municipal charters, not only regulate the speed of trains and moving cars, but prescribe regulations for maintaining the necessary flagmen or watchmen at street crossings, to secure the safety of the public; and that railroad companies, as matter of legal duty, must comply with such requirements and regulations, if they are reasonable. Of course, nothing unreasonable can lawfully be prescribed by virtue of general police powers, or, if prescribed, can be enforced. The mixing up of flagmen or watchmen, with the official police of the city is irregular, but seems to us not to vitiate an ordinance on the subject which railroad companies have virtually recognized and assented to, by employing and using, as flagmen or watchmen, persons invested with general police powers in addition to their functions as railroad employes. We will add that the style of the charge touching the city ordinances was too absolute and unconditional, in treating them as law, without any reference to the jury of the question of facts as to whether there were such

Negligence
as matter
of law—
Violation of
ordinance.

ordinances before them, and perhaps as to whether they were reasonable. The manner of dealing with the subject in *Central R. & Banking Co. v. Smith*, *supra*, was more satisfactory, save that the ordinance involved in that case was not applicable to the facts.

4. On the measure of damages, see the fourth head-note. We think the court laid down substantially the correct rule in the thirty-eighth ground of the motion for a new trial, and in that part of the fortieth ground preceding the instruction relating to the discretion of the jury in allowing interest. We regard

Measure of what is complained of in the thirty-sixth ground of
damages. the motion as subject to just criticism, and we think

it a sound direction to give that this part of the charge be omitted on a future trial. A brief, but excellent, model of a charge upon the measure of damages, where the subject of the injury was a child, will be found in *Davis v. Central R. Co.*, 60 Ga. 329. The court erred in not granting a new trial, more especially upon the fortieth ground of the motion. But we put the reversal of the judgment upon the whole case, and think its merits should be investigated anew, in the light of this opinion. As to grounds of the motion which we have not referred to, we regard them as free from substantial error.

Judgment reversed.

Municipal Ordinance—Validity.—An ordinance of a city prohibited railroad companies from running trains within the limits of the city at a greater speed than four miles per hour. In an action to recover damages for personal injuries, it appeared that the train which injured the plaintiff was running at the rate of twenty-eight miles an hour. The distance of the route over which the train travelled was ten miles, situated partly within the city in question and partly within the adjoining city. The defendant offered to show that at least sixty-six regular trains were running over this line of road every day; that this train carried upon an average 3,500 people; that in addition to these trains over 3,000 tons of freight had to pass every day, and that if the ordinance in question, and a somewhat similar ordinance in the adjoining city, were complied with by the trainmen, two hours and ten minutes would be consumed in making the run from depot to depot. It was held (following *Knobloch v. Chicago M. & St. P. R. Co.*, 31 Minn. 402; s. c., 14 Am. & Eng. R. R. Cas. 625), that the ordinance was not so palpably and manifestly unreasonable, and such an abuse of the discretion and arbitrary exercise of the power of the city council upon its face, as would justify the court in setting it aside. It is also held that the offer of the defendant was not broad enough to justify the court in doing so, and that to render it sufficient, it must also be proved that the locality in question was sparsely settled, and its streets of such a character and so little frequented, as to render the ordinance unnecessary, and hence oppressive and void. *Weyl v. Chicago, St. P. R. Co.* (Minn.), 42 N. W. Rep. 24.

See *Knobloch v. Chicago M. & St. P. R. Co.*; 14 Am. & Eng. R. R. Cas. 625, note, 627.

CHARMAN

v.

SOUTHEASTERN RAILWAY COMPANY.

(L. R., 21 Q. B. Div. 524.)

Crossing—Obligation to Maintain Gates—Statutory Duty.—By § 47 of the Railway Clauses Consolidation Act, 1845, "If a railway cross any public carriage road on a level, the company shall erect and at all times maintain good and sufficient gates across such road, on each side of the railway, where the same shall communicate therewith . . . and such gates shall be kept constantly closed across such road on both sides of the railway, except during the time when horses, cattle, carts or carriages passing along the same shall have to cross such railway; and such gates shall be of such dimensions and so constructed as when closed to fence in the railway and prevent cattle or horses passing along the road from entering upon the railway." In an action against a railway company for not properly fencing their line at a level crossing according to § 47, whereby horses belonging to the plaintiff strayed on to the line and were killed, it appeared that there were gates at the level crossing of the full width of the road properly so called, but that a swing gate had been placed by the defendant's upon a piece of land beyond the limit of the road, on the same line with the gates, for the convenience of foot passengers using the crossing. The plaintiff's horses, after straying from his land, arrived at the gates at the level crossing, and finding them closed, turned aside to the swing gate, and, forcing their way through it, owing to the defective condition of the posts, got on to the line and were killed by a passing train. *Held*, that there was evidence of a breach of the defendant's obligation under § 47 to fence in the railway from the road, and that they were liable.

APPEAL by the defendants against an order of a divisional court (Manisty and Stephen, JJ.) for a new trial.

The action was brought against the defendants for not fencing their line in accordance with their statutory obligation under 8 & 9 Vict. c. 20, § 47, ¹ whereby two horses of the plaintiff strayed on the defendants' line and were killed by a **Facts.** passing train. At the trial before Huddleston, B., it appeared that the plaintiff was occupier of a farm at Albury, Surrey, and that four horses belonging to him strayed one night from the farm into an adjoining road, and found their way on to an open common, and thence into a road leading from the common across the railway, which it crossed on a level. At the crossing the railway was pro-

(1) Sec. 47 enacts that, "If the railway cross any turnpike road or public carriage road on a level, the company shall erect and at all times maintain good and sufficient gates across such road, on each side of the railway where the same shall communicate therewith, and shall employ proper persons to open and shut such gates; and such gates shall be kept constantly closed across such road on both sides of the railway, except during the time when horses, cattle, carts or carriages passing along the same shall have to cross such railway; and such gates shall be of such dimensions and so constructed as when closed to fence in

tected from the road by two large gates which were opened when necessary to allow any vehicle or animals proceeding along the road to cross the railway. On the left hand side of these gates, upon a triangular piece of ground belonging to the defendants, and beyond the limit of the road, was a smaller swing gate for the use of foot passengers which was not kept locked, and by means of which passengers could cross the railway at any time. The plaintiff's horses, as was supposed, on arriving at the crossing and finding the larger gates closed, turned towards the small swing gate and pushed against the fence between the posts. One of the posts, of which the part sunk in the earth had become rotten, gave way, and the fence between the posts fell down, and thus the four horses got on to the railway, and two of them were killed by a passing train.

The learned judge held that there was no evidence of negligence to go to the jury and directed that judgment should be entered for the defendants upon a motion for a new trial. The divisional court held that it was a question of fact for the jury whether the fence which the horses broke down was a part of the gate which, by § 47 of the Railways Clauses Act, 1845, the railway company were bound to maintain at the level crossing, and that there must be a new trial. The defendants appealed.

W. Willis, Q. C. and Leslie Probyn for the defendants.

Winch, Q. C. and Tufton for the plaintiff.

LORD ESHER, M.R.—This is not an easy case to decide, but we must endeavor to construe § 47 in a reasonable manner, having regard to the purposes for which it was framed. I will assume that the gates at this level crossing are the exact width of the road. A small swing gate has been placed by the defendants beyond the limit of the road, in the same line with the wide gates, for the use of persons crossing the line on foot. I will assume that this gate and the fence surrounding it, as they were originally constructed, would have kept horses and cattle off the railway, and that the fence had, without any negligence of the company, but by reason of their not having observed the rotten condition of one of the posts, become insufficient for that purpose. If that be so, and if the defendants were bound to guard that particular spot, it was the same thing as if there had been no guard there at all. The

the railway and prevent cattle or horses passing along the road from entering upon the railway."

Sec. 68 enacts that a railway company shall make and maintain, "for the accommodation of the owners and occupiers of lands adjoining the railway . . . sufficient fences for separating the land taken for the use of the railway from the adjoining lands not taken, and protecting such lands from trespass, or the cattle of the owners or the occupiers thereof from straying thereout by reason of the railway."

question, therefore, must come to this, whether, as against the plaintiff, the defendants were bound to guard that particular spot, so as to prevent straying cattle or horses getting from the road on to the railway. Now the plaintiff's horses were straying horses, and, therefore, if his case were rested upon § 68 of the act, the authorities show that he was not using the road by his horses in such a way as to enable him to recover damages from the company under that section. The decision in *Manchester, Sheffield and Lincolnshire Ry. Co. v. Wallis*, 14 C. B. 213, was, I think, a strong decision, but it was the decision of a very strong court. It amounted to this, that if a man is driving his cattle along a road which runs alongside a railway, or even allowing them to be upon it, he is entitled to protection under § 68 as an "occupier" of land adjoining the railway, but that if his cattle are straying on the road or are driven there by some one else without his consent, although his cattle are doing the very same thing, and are running precisely the same danger as if they were there with his consent, he is not an "occupier" of the road, and § 68 does not apply to him. It is useless now to cavil at that decision, and I think that no court of appeal ought to interfere with it and the cases which have followed it, for the business of the railway companies of this country has been for many years carried on subject to them, and the railway companies, though they have had many opportunities have not attempted to obtain an alteration of the law as so declared. I think, therefore, that those decisions must stand. I will only venture to say, that, if they did not stand, I should be inclined to go further in favor of the railway company than they did. It is plain that the plaintiff cannot avail himself of § 68.

The question therefore is reduced to this—whether, according to the true construction of § 47, the plaintiff can avail himself of the protection given by it. The railway company have brought their line at a level across this road, which was existing before the railway, and § 47 is intended to give protection to some extent to the persons who are using a road which is interfered with in this way by a railway. Therefore, I think that, so far as is possible, § 47 ought to be construed so as to give the necessary protection to the persons whose former free passage along the road is interfered with by the railway—in such a way as to give those persons, so far as the words will permit, an effectual remedy. It has been argued that the words of the section oblige us to say that, if the company's gates which are put across the road are of the same width as the road, that is all which the company is called upon to do, and that, if cattle make use of the road in the way in which cattle will almost inevitably use it, and there is a defect in the protection of the railway beyond the width of the road, the

Gates at
level cross-
ing.

company will not be liable for any injury which may result to the cattle from their getting upon the railway. It is obvious that in such a case as the present, if a place beyond the width of the road in a line with the wide gates is left unprotected, the almost inevitable consequence will be that cattle going along the road in the ordinary way in which cattle are almost certain to do will get upon the railway beyond the gates. If so, it seems to me that the remedy supplied by the gates would not be effectual to prevent the mischief, which is caused by the fact that the railway is brought across the road on a level. We must, therefore, examine § 47 closely to see whether the words oblige us to say that this ineffective remedy is all the remedy which the legislature has given to the persons who use the road. Now § 47 says that the company shall erect and maintain sufficient gates "across such road." The gates will be "across" the road, even if they are wider than the road. They cannot be narrower than the road, but they may be wider. Then § 47 says that the gates are to be "of such dimensions, and so constructed, as when closed to fence in the railway"—not to fence in the road or the level crossing, but to fence in the railway—"and prevent" (that is, constructed so as to prevent) "cattle or horses passing along the road from entering upon the railway." If the words "along the road" are construed with the utmost strictness, they must, no doubt, be limited to cattle and horses keeping on the actual line of the road. But, giving to the words a construction which I think they will fairly bear, they may be read so as to make the remedy effective, that is, as meaning, "so as to prevent cattle using the road as a road of passage from entering upon the railway." And one consideration seems to me to show conclusively that the gates must in some cases be wider than the road. Suppose that, as happens in many cases, the line of railway is wider than the road; if the gates in such a case were only the exact width of the road, though they would bar the road when they were shut across it, they would not, when they were closed across the railway to allow cattle to pass over it, prevent the cattle from entering upon it. There would be an opening in the middle through which the cattle could pass on to the line. In such a case the gates must clearly be wider than the road. Supposing, then, that the circumstances are such that, if the gates when they are shut across the road are only of the exact width of the road, there will be left a gap so near to the gates that horses and cattle using the road, and acting in the way in which horses and cattle would almost inevitably act, or, at all events, in which it is extremely probable that they would act, would step off the road, and, seeing the gap at the end of the gate, would naturally go through it on to the railway. If § 47 only requires that the gates should be of the exact width of the road, the consequence in such a case would be that, though the

railway had come across the road at a level, the remedy of the gates given by § 47 would not be a real remedy for the mischief so far as horses and cattle are concerned; it would be just as inefficient as if there were no gate at all across the road. Is that the true meaning of § 47? In my opinion it is not. I think that the company are bound to make the gates, not merely the width of the road, but of such a width that when they are closed they will fence in the railway so as to prevent cattle or horses, which are using the road as a road of passage, and acting as cattle or horses naturally would act upon such a road, from entering "on the railway"—not merely from entering on the level crossing—but from entering on the railway, and, whatever the width of the road, if it is necessary to do so in order to give that protection, the gates must be made wider than the road. To say, however, that the company would be obliged to make a fence a quarter of a mile long, or even a hundred yards long—something which no one could call a gate—would be absurd and unreasonable. The obligation is to make something which can reasonably be called a gate, of such a width as to prevent cattle or horses which are going along the road from getting onto the railway, if they are only acting as cattle or horses according to their nature will almost inevitably act.

Under the circumstances of the present case, it seems to me that the large gates were not wide enough, but that the company were bound also to maintain the swing gate at the side and the fence surrounding it, in a proper condition. The evidence shows that this fence was not in its then condition sufficient to prevent the plaintiff's horses, which were using the road, from going onto the railway. In my opinion, the company were bound to make and maintain all the gates which they had actually erected in a sufficient state of repair. Judgment must therefore be entered for the plaintiff for the amount which we are told has been agreed upon between the parties.

Obligation to maintain swing gate and fence surrounding it.

LINDLEY, L. J.—I also am of opinion that this case ought to be decided adversely to the railway company.

We ought to be careful, on the one hand, not to stretch the obligations of railway companies in favor of other persons, and, on the other hand, to see that the obligations which are imposed on the companies by the legislature are adequately performed.

Object of statute.

It is impossible in dealing with a question of this kind to avoid looking both at § 47, which relates to level crossings, and at § 68, which relates to the fences of land adjoining the railway. The object of the two sections together is, that the railway may be properly fenced off both from public highways which it crosses and from adjoining land. That is the object of the two sections, and

they ought to be construed so as to give effect to that object—so as to protect the public who use the highways and level crossings and to protect the owners of adjoining land. If Mr. Willis's construction¹ is right, there will be a very serious omission in the protection given to the public from the danger of level crossings.

In my judgment the present case turns very much (indeed I might say entirely) upon that which the railway company themselves have done. They have in fact widened this road at the level crossing—whether they have thrown the triangular piece of

Railway company must main- tain gate erected for convenience of foot traveller.	land by the swing gate into the road so as to dedicate it to the public I need not pause to enquire. Physically they have widened the road upon which cattle passing along can get, and they have made that little triangular piece of land a part of the level crossing. They have done this partly for their own convenience, and partly for the convenience of the public. It is obviously extremely convenient for foot passengers not to be kept waiting until the large gates are open, and, on the other hand, it is extremely convenient to the rail-
--	---

way company not to be compelled to have a porter always there to open the large gates. It is a mutual convenience. But I wish to point out that this § 47 would not apply to a case in which the road had not been widened by the railway company for purposes of their own. In the present case the company have widened the road, and have put three gates across it instead of two. One of those gates was defective, not defective for foot passengers, but the post of the fences against which it rested had got into such a rotten condition that the plaintiff's horses pressing against it broke it down and so got onto the railway. It appears to me, looking at the duty which § 47 imposes upon the company of fencing off their line at level crossings, that they have failed to perform their obligation.

The key to § 47 appears to me to be found in a consideration of its general scope, and not in a very critical examination of its language. The object of the section is, that the railway shall be effectually fenced off from roads which it crosses on a level, and the company are bound to maintain "sufficient gates" across the road—it does not say one, or two, or how many—and the pith of it is, that the gates "shall be of such dimensions and so constructed as when closed to fence in the railway and prevent cattle or horses passing along the road from entering upon the railway." I say nothing about the case of an open field on one side of the road adjoining the railway, and some portion of the fence of the field being broken. We have to deal with a case in which the road has been widened by the company, so that cattle or horses passing

(1) That the obligation imposed on defendants by section 47 only compels them to maintain gates of the exact width of the road which the railway crosses.

along the old road can get onto the triangular piece of ground which has been added to it, and it appears to me that the railway company have failed to keep in sufficient repair the gates which they have placed across the road thus widened. That is the substance of the case. Any other construction of the act would lead to this result, that, in consequence of some little overlapping of the two sections, the company would not do the very thing which they were intended to do, viz., prevent horses and cattle from getting on to the railway. Having widened the road for their own purposes and for the conveniences of the public, the company must put up sufficient gates to satisfy § 47. I do not think this is a case under § 68, but I think it falls under § 47.

Appeal dismissed.

FREEMAN *et al.*

v.

DULUTH, SOUTH SHORE AND ATLANTIC R. CO.

(*Michigan Supreme Court, February 8, 1889.*)

Crossing—Negligence—Flagman—Statutory Requirements.—In an action to recover damages for injuries to plaintiff's horse and carriage, it appeared that a person standing in the center of the street, 40 feet from the railroad track, could see the top of a locomotive at a point 179 feet from the intersection of the railroad track with the center of the street, and that the nearer any one approached the railroad track, the further a locomotive could be seen from the street. On one side of the street there was a steep up-grade, so that a train of loaded cars must, in order to ascend the same, cross the street at a higher rate of speed than would, considering the situation of the crossing, be prudent to the safety of passengers on the street without warning of the train's approach. By statute, the duty of determining the necessity of appointing a flagman upon any street crossing the railroad, was placed upon the railroad commissioner. *Held*, that although the absence of a flagman at the crossing in question was of itself no evidence of negligence on the part of the defendant, the jury were warranted in finding that it was negligence in the defendant not to provide a flagman thereat.

Same—Contributory Negligence—Stopping to Look.—The evidence showed that the driver of a horse and buggy must have seen the train in time to avoid the accident if he had stopped to look, and that he was driving the horse at a quiet trot, and could easily have stopped. *Held*, that notwithstanding the negligence of the defendant in failing to hire a flagman at the crossing, the contributory negligence of the driver precluded the plaintiff from recovering.

ERROR to Circuit Court, Marquette County.

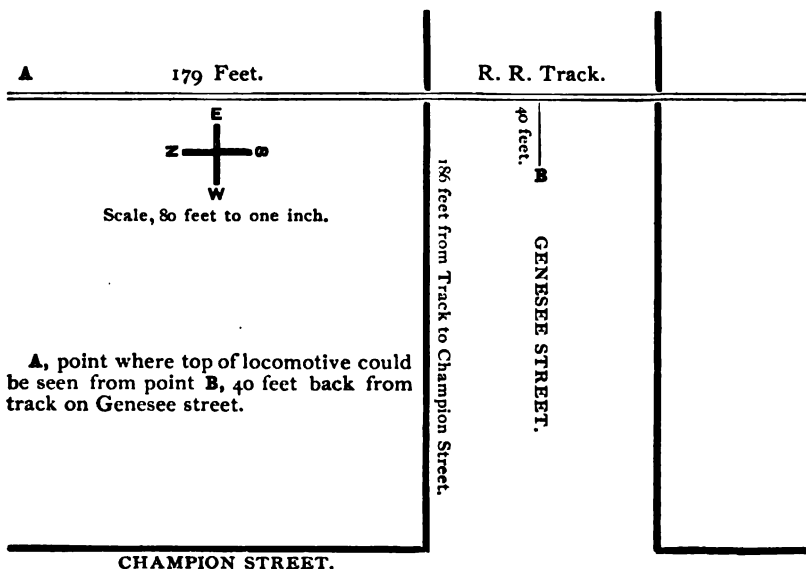
Action by George Freeman and others against the Duluth, South Shore & Atlantic R. Co. to recover damages for negligently destroying a horse and carriage belonging to the plaintiff. The jury returned a verdict for the plaintiff, upon which a judgment was entered. The defendant thereupon appealed.

W. P. Healy for appellant.

F. O. Clark for appellee.

MORSE, J.—The plaintiffs sue for the value of a horse and carriage destroyed by collision with an engine on defendant's track at the Genesee street crossing in the city of Marquette.

The plaintiffs keep a livery-stable in said city, and on the day of the accident hired the horse and carriage to one John Grant, who was driving the same at the time of the collision. During the course of the trial, by mutual consent of the parties, the place of the accident was visited. The following appears in the record in reference to such visit: "The court thereupon took a recess for one hour, and the court, counsel, jury, and court officers, by stipulation of the counsel, visited the scene of the accident. The jury then proceeded to measure the distance from the intersection of Champion street with Genesee street to the track in question, and found the same to be one hundred and eighty-six feet. It was also ascertained as a fact in the case that a person standing forty feet west of the track in question, in the center of Genesee street, could see the top of a locomotive one hundred and seventy-nine feet north of the center of Genesee street, on the track in question. The court, jury, court officers, and counsel for the respective parties, after ascertaining these distances, returned again to the court room, to proceed with the trial of the said cause." A diagram showing the streets, measurements, and railroad track is given below:



A, point where top of locomotive could be seen from point B, 40 feet back from track on Genesee street.

It will thus be seen that it was established as an undisputed fact in the case that a person standing in the center of Genesee street, at the point B, could see the top of a locomotive at the point A, 179 feet north of the intersection of the railroad track with the center of said Genesee street. It was also conceded on the argument here that the nearer you approached the railroad track from the point B, the further you could see a locomotive coming from the north on said track, while west of the point B, between such point and Champion street, the view of the track north of Genesee was nearly, if not entirely, obstructed, and shut off by the high bank on the north side of said street. The jury were charged by the court, and retired to deliberate upon the case. After being out for a time, they returned into court for further instructions, whereupon the following proceedings took place: "*Juror*. The question is whether the omission of a flagman at that crossing is a preponderance of evidence in favor of the plaintiff. *Court*. Whether there is a preponderance of evidence? *Juror*. Yes, sir; of the defendant having no flagman there. That seems to be the great question,—not having a flagman there. Perhaps some other juror can explain better. *Another Juror*. Well, we think the evidence is all equally balanced outside of the omission of the flagman. We all want to know whether the omission of a flagman will over-balance all the other evidence. *Court*. I don't know as I exactly understand. There are the three allegations of negligence; you will discuss them each separately. If you have disposed of the question of the bell ringing and the blowing of the whistle, and if you find that the bell was rung and the whistle was blown, then, of course, there was no negligence there; then it leaves you simply the question of whether or not it was negligence in failing to put the flagman there. Is that the point? *Juror*. That is the point." The court then read to them what he had before instructed them in regard to the duty of the defendant to have a watchman or flagman at this street, and added some further remarks to the same import, and in the same direction, which instructions we shall refer to hereafter.

It will therefore be seen that it is to be presumed from this colloquy between the court and jury that the questions whether the whistle was blown and the bell rung in compliance with the statute, and in such manner that there was no negligence on the part of defendant in either of these respects, had been determined in favor of the defendant, and that the sole negligence remaining to be found against the railroad company was that of the absence of a flagman at this crossing; and if the absence of such flagman was not negligence, the plaintiffs ought not to, and would not, have recovered. The contention of the defendant is that it was not negligence. It is claimed that under the statutes of

this State the duty of determining where a flagman shall be stationed devolves on the railroad commissioner; and that, in order to hold defendant liable for such negligence in this case, it should have appeared in proof that the railroad commissioner had ordered a flagman to be stationed at this crossing, and that his orders were not obeyed; or that the crossing was such an exceptionally dangerous one that a common law duty was imposed on the defendant to keep a flagman at that point; and that no showing of this kind was made in this case.

We think the judge below ruled correctly on this point, and in accordance with our previous decisions. The jury were instructed, substantially, that it is not the law of this State that at every road or street crossing in a village or city a railroad company is bound to place a flagman. The law put upon the railroad commissioner the duty of determining the necessity of establishing a flagman upon any particular street crossing of a railroad, and the absence of a flagman at Genesee street crossing, where the accident occurred, is of itself no evidence of negligence upon the part of the defendant. And the plaintiff must show that the circumstances of the crossing are such that common prudence would dictate that the railroad company should place a flagman there, or his equivalent. That before the jury could find this, it must be made to appear to them that the danger at the crossing was altogether exceptional,—that there was something about the case rendering ordinary care on the part of the witness Grant (the driver of the horse and carriage) an insufficient protection against injury, and therefore made the assumption of the burden of a flagman on the part of the railroad company a matter of common duty for the safety of people crossing. “You have, as I said before, been at this crossing. You have seen the situation. You have seen its relation to travel and to the city; and it is for you to determine, if you reach that point, under all the circumstances of the case, whether or not it was negligence, under the instructions I have given you and the evidence, not to have a flagman there.” If any fault can be found with this charge, it was too favorable to the defendant, in that it connected the necessity of keeping a flagman at this crossing with the use of ordinary care on the part of Grant. The duty of maintaining a flagman at this point did not depend on the question whether Grant, in this particular instance, could by common prudence have avoided this collision or not. It depended rather upon the situation of the crossing, its relation to the travel upon the street generally, and the facilities afforded, not only the travellers on the street, but the trainmen on the cars, to avoid collisions and accidents of this kind, without a flagman to give warning of approaching trains.

**Question
at issue.**

**Absence of
flagman not
of itself
evidence of
negligence.**

I think the jury were warranted in finding it to be negligence in the defendant in not providing a watchman at this point. It seems that to the south from Genesee street there was a steep up-grade, so that a train of loaded cars must, in order to ascend the same, cross the street at a higher rate of speed than would, considering the situation of the crossing, be prudent to the safety of passers on the street, without warning of the train's approach. A train coming from the north could not be seen at all by those travelling on the street in the direction Grant was driving, until the traveller was within 40 feet of the track, and the train within from 150 to 175 feet of the center of the street. And the engineer on the train, being lower down in his cab than a man in a buggy, could not get his eye into Genesee street, west of the track, as was the fact in this case, until the locomotive was with 60 or 75 feet from the crossing; and then his vision would only extend 40 or 50 feet west of the track on the street. Under such circumstances, a train ought to run over this crossing so that it could be stopped at once, or a flagman ought to be stationed where he could give warning of its approach. When an engineer, at a distance beyond 75 feet from the crossing of a street in a city like Marquette, cannot see into the street except the straight line thereof where the track crosses, and the traveller cannot see even the top of the locomotive until he gets within 40 feet of the track, something more than ordinary pains to prevent accidents is incumbent both on the railroad company and also on the traveller, if such traveller is acquainted with the situation. In *Battishill v. Humphrey*, 64 Mich. — 34 Am. & Eng. R. R. Cas. 69, we held, under the pleadings and testimony in the case, that the absence of a flagman at Summit avenue crossing in Detroit could not be considered negligence in the railroad company, as the railroad commissioner had not determined that it was necessary to maintain one there. But nothing was said, or intended to be said, in that opinion that there could be no negligence, in any case, in not maintaining a flagman at a street crossing unless such commissioner had ordered one to be stationed there. In *Guggenheim v. Lake Shore & M. S. R. Co.*, 32 Am. & Eng. R. R. Cas. 89, the law in this respect is laid down substantially as the circuit judge in this case instructed the jury.

Negligence
not to pro-
vide flag-
man at
crossing in
question.

The most serious question in the case is the imputed contributory negligence of the driver, Grant. It is claimed by the defendant that Grant was negligent, from his own testimony, and that of one of the persons who was with him, Sundberg, and that a verdict should have been directed for the defendant for this reason. The court below submitted this question to the jury. It appears without dispute that both Grant and Sundberg had been drinking considerably during the day. It was the day of the

county fair, and Sundberg had come on the cars from Ishpeming to attend it. Grant had hired the team, in the first place, to take his wife to the fair. In the afternoon he fell in with Sundberg, an old acquaintance of his. He sent his wife home, or up to the fair, a boy by the name of Pritz driving. While waiting for the boy to return, he and Sundberg visited four or five saloons, and drank beer in most of them. When Pritz came back with the horse the three of them went for a drive. It was about six o'clock, or a little after, in the evening; but it was not yet dark. Grant sat on the right-hand side of the carriage, and Sundberg on the left, the boy on their knees and between them. They came down Champion street on a trot, and turned into Genesee street, going east. Sundberg was then, of course, on the north side of the carriage seat, and on the side towards the approaching train. Grant thinks he came to a stop before he came to the track, but he cannot say that he did, "because I ain't sure." Sundberg says: "We didn't drive very fast when we got down to the corner there, down to the railroad track; just trotting along slowly." Jessie Smith, who saw the accident, and was sworn for the plaintiff, says that "they were driving kind of slow trot as they went by the house. . . . I saw the buggy come along on a slow trot, and the first thing I knew, I saw the train strike the buggy, or horse." It is plain from all the evidence that the horse was not stopped, but that he was trotting from Champion street, through Genesee, until the accident. The next question is, did the driver look? It is, as before said, an established fact in the case that the train could have been seen from any point within 40 feet of the track, 179 feet north of the center of Genesee street. If the train was running 12 miles an hour,—the fastest time testified to by any witness,—the locomotive would have occupied about 10 seconds in passing over this 179 feet. The horse would have reached the track and passed it within that time, if on a trot,—the distance being 40 feet and the width of the track. It would seem, therefore, to be an absolute certainty that if Grant had looked north when he was 40, 30, or 20 feet from the track, he would have seen this train. He could, at either of these points, have stopped the horse, and saved the accident. When he was within 40 feet of the track, the train must have been in plain sight, or he would have passed over the track in safety in front of it, because he could not have seen it, if it had been more than 179 feet away; and, if so, it would not have struck him, because at 12 miles an hour, or less, it would have required 10 seconds or more to have reached the place of the accident. If it was in plain sight when he was 40 feet away, it was in plain sight from that time until the collision, to one looking north for it. Sundberg swears that he did not look to the north after they passed about the center between

Champion and Genesee streets, until "just as we got up to the railroad track." Then it was too late to stop. "*Question.* If you were looking, couldn't you have seen it, if you had looked, say 20 feet away from the track? *Answer.* If we had stopped and looked, I think we could." He further testified, on cross-examination, that if the horse had stopped 20 feet away from the track, he thought the train would have been seen; but "as long as we didn't see the train we were going ahead. I didn't look and see it in time; not after I looked the first time,"—referring to his first look to the north from half way up Genesee street. From Champion street to the track crossing Genesee street is 186 feet. He therefore looked to the north from a point more than 90 feet from the track, where his view of the train was entirely obstructed by the high bank. Sundberg was a stranger to this crossing, and might perhaps be excused from looking again, as he testifies that after looking north he looked to the south. Seeing no train approaching from either way, he then looked at the crossing, saw that was clear, and thereafter kept his eyes upon it. The boy Pritz was in Europe at the time of the trial and was not sworn.

Grant testifies: As I approached the track, I saw it ahead, I was looking around to see if anything was moving or coming; looking all over, to see if anything was moving there that I should have to stop for. I did not hear any train coming. I heard nothing. I did not hear any bell ringing, nor any whistle blowing; I should think I would have heard a bell or whistle if there had been any rung or blown. My hearing was good at that time. When I first saw the engine, the horse was just stepping across the track,—across the first track. I could not say how near the engine was to the horse at that time, but it could not have been very far. It wasn't far; just close by. I tried to back up to get out of the way, but I could not get out fast enough. There was a bank on the left-hand side along the track where the engine was coming down." And that a person could not see over the bank to the north, while driving on Genesee street, and notice a train until the track was reached. This evidence was given before the jury examined the premises. On cross examination he testified that a person standing on Genesee street, 40 feet west of the track, he thought could not see the top of a locomotive 150 feet up the track to the north, but that he had never tried it to see. We are impelled to the conclusion that if Grant looked to the north for an approaching train, as he says he did, he did not so look after he came within 40 feet of the track. He must have looked back somewhere near where Sundberg did, and where the bank obscured his vision. Grant was not a stranger to this crossing, and the question arises, was his full duty performed? We think not. Was he acting with even ordinary prudence, when he was driving this 40 feet, without looking to the north? Could he excuse him-

self by looking north, where he knew the high bank cut off his view, and then drive straight on to the track, without looking again, when the track was in sight to the north, because he heard, as he says, no bell or whistle, or noise of an approaching train? We think the answer must be in the negative.

A railroad track is a perpetual menace of danger, and the traveller is not excused if his eyes and ears are not kept open up to such

Duty of traveller to look and listen.	distance of it that he may stop if he can see or hear its approach. If he had looked at any time within the 40 feet before he drove his horse upon the track, we think he must inevitably have seen this train, and could have saved a collision; and that, knowing the situation at the crossing as he did, he was guilty of contributory negli-
--	---

gence in not doing so. There is a fair inference to be drawn from his own testimony, and that of his companion Sundberg, that both had drank so much that they did not exercise the usual caution that a sober man uses in such an emergency; and that the recklessness of too much drink, though neither might be called drunk, had something to do with their neglect to take ordinary precaution and prudence in attempting to make this crossing. The conclusion is irresistible that they drove down Genesee street upon a trot, and, without looking to the north, when they ought to have done so, ran the horse negligently and carelessly on the track and in the way of the locomotive. It is no answer to say that if the company had not been negligent in the matter of a flagman the accident would not have happened. It must be considered, as before said, that the jury determined that there was no negligence on the defendant's part in relation to the blowing of the whistle and the ringing of the bell. The testimony was conflicting on these points, and the jury evidently found against the plaintiffs in this respect. If Grant had exercised common ordinary prudence at this known to him to be a dangerous crossing, the collision would not have taken place. The company was at fault in not having a flagman, and he was at fault in being careless and reckless in his driving, without looking, as he ought to have looked. His fault contributed to the injury, and he cannot recover unless the defendant was guilty of such reckless negligence in the premises that the question of contributory negligence cannot arise in the case, as in *Battishill v. Humphreys*, 34 Am. & Eng. R. R. Cas. 69. The testimony, in our opinion, did not show such reckless and wanton negligence on the part of the defendant as would acquit the plaintiff of his fault. A verdict should therefore have been directed for the defendant.

The judgment must be reversed, with costs, and a new trial granted.

LONG, J., did not sit. The other justices concurred.

Crossing—Open Gates—Failure to Look and Listen.—Whilst a fireman was

driving at full speed to a fire, the hose carriage upon which he was riding was struck by a passing train, and he was thrown off and injured. At the crossing, the railroad company had for some time kept a watchman, and safety gates, which were lowered upon the approach of trains. Upon the night in question, when the hose carriage approached the crossing, the gates were not lowered. They had become out of order that morning, and had not been repaired. The watchman displayed no light and gave no warning. The hose carriage was not stopped as it approached the track, in order to afford an opportunity to look and listen, nor had it slackened its speed. *Held*, that notwithstanding the fact that the gates were out of order and the railroad company omitted to take any extra precaution, plaintiff could not recover by reason of his failure to stop, look and listen. *Greenwood v. Philadelphia, Wilmington & Baltimore R. Co. (Pa.)*, 17 Atl. Rep. 188.

Same—Contributory Negligence—Evidence.—Deceased was killed whilst driving his wagon and team across the line of the defendant's road. The railroad company had erected gates at the crossing worked by a pneumatic tower, which were ordinarily lowered across the streets when a train was approaching. On the morning in question a fog had prevailed, so that the men could not, from the tower, keep watch of the track, and they had left the gates upraised, and had been acting as flagmen upon the ground. Several teams were waiting for the clearing of the track, and the wagon driven by the deceased, being heavily laden, was the last to reach the rails. Just as the horses were passing upon the line of rails on which a train was approaching, a companion of the deceased gave the alarm, and sprang from the wagon. The deceased was seated on a spring board in the front of the wagon, with his feet resting on a foot board attached to the wagon box. When the alarm was given he rose up and struck the horses with the reins to urge them forward. Just as he did so, the foot board broke beneath his weight, and he fell beneath the wheels, was run over and received fatal injuries. The flagman pulled the body from the track, so that it was not touched by the locomotive. By the running away of the horses the wagon was cleared from the track, and escaped an actual collision with the train. There was evidence tending to show that the foot board was defective, but none to prove that the deceased knew it; and it appeared that one of deceased's companions, who was heavier than he, sprang from it without its breaking. *Held*, that it was not error to withdraw from the jury the question of contributory negligence on the part of the deceased in standing upon the defective foot board. *McIntosh v. Chicago, Milwaukee & St. Paul R. Co.*, 36 Fed. Rep. 661.

Same—Contributory Negligence—Neglect of Flagman's Signal.—Plaintiff, who was driving a wagon, failed to heed the flagman's signal, and flagman thereupon halloed to the plaintiff to stop, and as he still continued his course, he seized his horse and endeavored to remove the wagon from the tracks. The horse's head was turned until the front wheel of the wagon was parallel with the track, when it became fastened so that it was impossible to get the wagon out of the way in time to prevent a collision, which threw plaintiff from the wagon and injured him. The evidence showed that every reasonable effort was made by the defendant's employes to avert the accident. *Held*, that the plaintiff's contributory negligence was the cause of the accident, and that he could not recover. *Deikman v. Morgan's Louisiana & Texas R. and Steamship Co. (La.)*, 5 S. Rep. 77.

Same—Contributory Negligence—Failure to Look—Province of Jury.—Upon a spur track terminating just east of the street, there stood 10 or 12 box cars. So far as appeared from the evidence there were no obstacles in the way to prevent a clear view of the tracks for more than a mile east of the street, except the box cars and a coal shed. On the morning of the accident, the plaintiff's servant drove a wagon with a team of mules at a slow trot towards the crossing. The evidence showed that before the accident the animals had no fear of the cars, but would stand up to a train, and allow it to go past them. The driver stated that he had them under perfect control, and as he came towards the crossing, with which he was well acquainted, he looked three times in the direction of the train, and did not see it, nor did he hear any of the signals. It was, however,

well established by the evidence that the whistle was sounded at the usual place, and the bell rung from that time until after the collision. It did not appear how far distant the driver was when he first inspected the tracks. The train approached at a speed of 28 miles an hour. Upon the uncontradicted testimony it appeared that if he had looked as soon as he passed the box cars, he could have seen for a long distance along the track, and must have seen the approaching train, and that the team could have been stopped before stepping upon the rails. *Held*, that the plaintiff's servant was guilty of contributory negligence, and that they could not recover for injuries to their wagon and team. *Weyl v. Chicago, Milwaukee & St. Paul R. Co. (Minn.)*, 42 N. W. Rep. 24.

Same—Open Gates—Contributory Negligence.—Deceased and two companions, one of whom owned and drove the team, approached very slowly in an open wagon, a level crossing on defendant's railway. It was about 10 o'clock on a starlight night. When about 350 feet from the crossing a locomotive whistle was heard, but no bell was heard by them at any time. Another railroad passed in the immediate neighborhood, and deceased and his companions could not tell from the sound of the whistle upon which road the train was. The team moved on without stopping, and almost immediately upon reaching the crossing, a collision took place by which two of the three men were instantly killed. The approach to the crossing was upon a slightly descending grade, and the view of the track was almost entirely obstructed by houses and other structures. Gates had been constructed at the crossing, but they had been left open, and the flagman had left them for the night. At the time of the accident the train was running at the rate of 25 miles an hour. By statute, railroad companies were forbidden from running trains across a highway near a compact part of the town at a rate of speed greater than six miles an hour, unless gates or flagmen were maintained. *Held*, that the fact that the gate had been left open was sufficient to send to the jury the question of the deceased's contributory negligence, and that a verdict for the plaintiff would not be reversed. *Hooper v. Boston & Maine R. Co. (Me.)*, 17 Atl. Rep. 64.

Same—Gross Negligence—Instruction—Province of Jury.—By statutory provision, the contributory negligence required to exempt the railroad company from liability was required to have been gross. The court instructed the jury that "a man might lie down on the track and rely on being warned of an approaching railroad train by the sounding of the whistle and the ringing of the bell; whereas, if the law did not enjoin specifically those precautions on the part of the railroad company, the man might be guilty of negligence, and would not be on the lookout when he knew he was approaching a railroad crossing." *Held*, that the charge presented to the jury, the state of facts mentioned as a standard for their government in determining the question whether or not the plaintiff in the action was guilty of gross negligence, and that the instruction was therefore an invasion of the province of the jury. *White v. Augusta & Knoxville R. Co. (S. Car.)*, 9 S. E. Rep. 96.

Same—Unavoidable Accident—Instruction.—In an action to recover damages for injuries sustained by plaintiff while driving across a railroad track, the defendant requested the court to charge that "if the jury found from the evidence that the injury to the plaintiff was the result of the accident without fault on the part of the railroad company, then the company is not liable." The court instructed the jury as requested, but added: "That is, if there was no negligence at all established against the railroad company, the railroad is not liable." *Held*, that the jury might have inferred from the instruction as given that it should appear that the company was free from all fault whether it contributed to the injury or not, and that the instruction was therefore misleading and erroneous. *White v. Augusta & K. R. Co. (S. Car.)*, 9 S. E. Rep. 96.

PITTSBURGH, CINCINNATI AND ST. LOUIS R. CO.

v.

KITLEY.

(Indiana Supreme Court, April 2, 1889.)

Obstructing Crossing—Frightening Horse—Complaint.—The complaint in an action to recover damages for personal injuries sustained through the defendant negligently and unlawfully leaving the box cars standing upon a highway, which frightened plaintiff's horse, is sufficient, although it contains no allegation as to why the horse became frightened at the car, or that there was something peculiar and unusual about the car likely to frighten a horse.

Same—Plank Crossing—Statutory Requirements.—Although the whole of a plank crossing is left clear of freight cars, a railroad company cannot urge that it did not wrongfully obstruct the crossing when by statute it is prohibited from permitting freight cars to stand across a highway without leaving a space of 60 feet for crossing, and such space has not in fact been left.

Same—Complaint—Negligence of Employees.—In an action to recover damages for injuries sustained through plaintiff's horse being frightened by a car standing upon a crossing, the complaint need not necessarily aver what employees left or placed the cars upon the track, and that it was the duty of such employees to have moved the car.

Same—Evidence—Similar Accidents—Rebutting Testimony.—In such an action, when one of defendant's witnesses has testified that other horses passed the car without being frightened, it is not error for the court to admit testimony in rebuttal that certain witnesses had driven across the tracks, and their horses had become frightened at the same car while it remained an obstruction to the highway.

APPEAL from Superior Court, Marion County.

Action by Caroline Kitley against the Pittsburgh, Cincinnati & St. Louis R. Co. to recover damages for personal injuries. The defendant appeals from a judgment for the plaintiff. In Indiana it is an indictable offence to wrongfully obstruct a highway, and a penalty is, by statute, imposed upon any person in charge of a freight train who stops it across a highway or permits it to remain there without leaving a space of 60 feet for crossing the tracks. Rev. St. Ind. 1881, §§ 1964, 2170.

Baker, Hord & Hendricks for appellant.

Ayres & Brown for appellee.

OLDS, J.—This is an action brought by the appellee against the appellant for damages resulting to the appellee by reason of her horse becoming frightened at a car negligently left standing upon the railroad track of appellant at a high- **Allegations of complaint.** way crossing, causing the horse to become unmanageable, running away, and throwing appellee from her buggy, and severely injuring her. The errors assigned and dis-

cussed by counsel for appellant in their brief are, the overruling of the demurrer to the complaint and overruling of the motion of appellant for new trial. After some formal allegations the complaint avers that on the 16th day of April, 1882, the defendant (the appellant) was using and operating a line of railway between the city of Columbus, in the State of Ohio, and Indianapolis, in the State of Indiana, which line passed through the town of Cumberland, Marion county, Ind.; that for two days before said 16th day of April, 1882, the employes of said road carelessly and negligently placed a car, which was used by said company, the defendant, in carrying freight over the line of its said road track, in the public highway crossing said track, leading from the town of Cumberland to the home of the plaintiff, about five miles south of Cumberland, in such manner that the wheels under the east end of said car were standing on or near the west end of a plank road-way in about the center of said highway, which plank-way had been provided as a crossing of said railroad track, and the east end of said car was nearly in the center of said public highway, partially obstructing its passage; that the employes of said defendant carelessly and negligently caused and allowed said car to so remain, partially obstructing said highway, from the time it was so placed there until after the happening of the accident hereinafter set out; that another car, used for the same purpose, was standing over a cow-pit to the east side of said highway, and that on the 16th day of April, 1882, plaintiff was travelling with one Jennie Tishner in a buggy drawn by a horse which she had been accustomed to drive, and which was a very gentle animal, along said public highway so leading from said town of Cumberland, which highway was the nearest and most direct route from said town to her home, and which crosses the defendant's road-track, which passes through said town, as above stated; that she attempted to cross said road-track through the space left between said cars, which was the only place for her to cross said track, turning a little to the east so as to have room to pass, and she says she approached said crossing with due care, but just as the horse reached said track he became frightened at the car so wrongfully placed and left standing in said road to its right, and commenced backing and rearing, becoming unmanageable, and threw this plaintiff from said buggy upon the ground, also throwing the other occupant of the buggy, who was a large and heavy woman, upon her; that she was a married woman, and in delicate condition, and was so hurt by the fall that she could not walk; and other allegations describing the nature and extent of the injury; and alleging that said accident occurred without her fault or the fault of the young lady riding with her contributing thereto.

The objections urged to the complaint by counsel for appellant are, first, that there is no allegation in the complaint as to why the

horse became frightened at the car; that a car is not of itself a thing likely to frighten a horse any more than a tree or a house; and that to make the complaint good it should allege that there was something peculiar and unusual about the car likely to frighten a horse. This objection, if tenable at all, could not be reached by demurrer. The complaint does allege that "the horse became frightened at the car," and this allegation is sufficient. There would be some force in the argument of counsel if addressed to a motion to make the complaint more specific. Yet, even as against such a motion, we think the complaint would be good; but the complaint is clearly good as against a demurrer on account of this objection. In the case of *Turnpike Co. v. Pumphrey*, 59 Ind. 78, the complaint alleged that the appellee's horse became frightened at a hole in the turnpike; that appellants had allowed the turnpike to get out of repair, and the floods had washed a hole near the center of the road, and appellants had negligently allowed it to so remain out of repair, and, appellee riding on horseback upon the turnpike, her horse took fright at the hole and threw her, inflicting severe injuries.

Not necessary to allege peculiarity in car likely to frighten horse.

The allegations in the two complaints are quite similar, and the complaint in that case was held good. There is, in the language of counsel for appellants, nothing "Gordon like" about a hole in the ground, even when it is a hole in a turnpike; yet it was unlawfully there, and the lady's horse became frightened at such unlawful obstruction, and threw her, and the court held the complaint good, and the turnpike company liable. So, in this case, the car negligently allowed to remain upon the track at the crossing of the highway. It was an unlawful obstruction of the highway, and the appellee's horse became frightened at such unlawful obstruction, and became unmanageable, and ran away, and injured her without any fault on her part. We do not hold that there is anything about a car that if, while in the lawful use by a railroad company, a horse would become frightened at it, and run away, and injure a person, the company would be liable; but in this case there was an unlawful use made of it. It was being used as an obstruction of the highway, and while occupying such unlawful position the horse became frightened at it. Had the company been using the car for a lawful purpose, it would have been removed from the highway two days before the injury, as appears from the allegations of the complaint, and the horse of the appellee would not have been frightened by such unlawful obstruction placed and allowed to remain in the highway by appellant. *Clinton v. Howard*, 42 Conn. 294.

It is further urged by counsel for appellant that the appellant company had the right to use all of the highway except

the plank crossing for the purpose of standing cars upon their track; that the car was rightfully upon the crossing. Such obstruction of a public highway is expressly prohibited by statute. See sections 1964, 2170, Rev. St. 1881; *Cleveland, C. C. & I. R. Co. v. Wynant*, 100 Ind. 160, 35 Am. & Eng. R. R. Cas. 328; *Young v. Detroit, G. H. & M. R. Co.*, 56 Mich. 430; 19 Am. & Eng. & R. R. Cas. 417.

Right of company to obstruct highway. The further objection to the complaint is that it does not aver that the appellant negligently placed or left the car upon the highway; that the complaint must specifically allege what employes placed or left the car upon the track, and that it was the duty of such employes to have removed the cars that, from aught that appears from the complaint it might have been placed and left upon the highway by employes of the company having nothing to do with the moving of cars for the appellant; that it may have been placed there by clerks or office boys. In view of the allegations of the complaint the court will not indulge in such wild speculation. The complaint avers that "two days before the said 16th day of April, 1882, the employes of said road carelessly and negligently placed a car which was used by said company (the defendant) in carrying freight over the line of its said road-track, in the public highway crossing on said track, in such a manner that the wheels under the east end of said car were standing on or near the west end of a plank road way in about the center of said highway;" and, after fully describing its situation, avers that "the employes of said defendant carelessly and negligently caused and allowed said car to so remain, partially obstructing said highway, from the time it was so placed there until after the happening of the accident." The charge both as to placing the car on the highway, and allowing it to remain is as to all the employes of the company. It is broad enough, and does include the employes whose duty it was to move cars, and to remove cars from improper places, and whose duty it would have been to have placed it at some other point than upon a highway crossing, and to have removed it after it was placed there. The charge is general, but if the appellant desired to have it specific it was its duty to have made a proper motion in the court below. The complaint is not objectionable to a demurrer, and the demurrer was properly overruled. *Mann v. Cent. Vt. R. Co.*, 55 Vt. 484; 14 Am. & Eng. R. R. Cas. 620.

Averment that cars negligently left on highway. There are numerous objections urged to charges given and refused by the court. Those strongest urged are based upon the same theory upon which it has been urged that the complaint is insufficient. We do not deem it proper to extend this opinion by setting out the charges. There was no error committed by the

court, either in the giving or refusing of the charges pointed out by counsel for appellant.

There is another cause urged for new trial; that is, admitting certain witnesses to testify that their horses became frightened at the same car while it remained an obstruction in the highway. It is unnecessary to decide whether this evidence was proper or improper, as it was introduced in rebuttal to the evidence of a witness on behalf of appellant, who had testified that he had seen horses pass there, and they were not frightened, particularly the horses of these witnesses who testified in rebuttal. Objection was made to the testimony of appellant's witness, which was overruled. Objection was not made to each question, but it was not necessary. Appellant offered such testimony, and there was an objection made by counsel for appellee, and appellant obtained a ruling in its favor. It cannot be heard to complain because the appellee met its testimony by testimony of like character. A party must be consistent. He cannot advocate a theory until he has obtained the admission of evidence in his own behalf upon such theory, and then renounce it and gain the benefit of an erroneous ruling which he was the first to ask the court to make. This is a doctrine well settled in this court. *Meranda v. Spurlin*, 100 Ind. 389; *Lowe v. Ryan*, 94 Ind. 450; *Nitche v. Earle*, 19 N. E. Rep. 749 (this term).

Evidence that other horses frightened admissible in rebuttal.

There is no error in the record for which the judgment ought to be reversed.

Judgment affirmed, with costs.

Obstructing Highway—Frightening Horse—Fledding.—In an action to recover damages for injuries sustained through plaintiff's horse taking fright at a car wrongfully left by defendant across a highway, a complaint which avers that the defendant unlawfully, carelessly and negligently placed the car on the public highway, is not open to demurrer by reason of the fact that it contains no averment that the car was permitted to remain on the highway an unreasonable time. The court said: "It is earnestly insisted that the complaint is bad because it does not aver that the car was permitted to remain on the highway an unreasonable time, and that therefore it may have been placed there only a moment before the accident, or, for aught that appears, it may have been attached to a train. We do not think this position is tenable. It is averred that the appellant unlawfully, carelessly, and negligently placed the car on the public highway. If it had placed it there in the ordinary transaction of the business of the appellant, and had not permitted it to remain an unreasonable time, it was not there unlawfully, as averred in the complaint. It is true that the complaint is vague and uncertain in its allegations, but such defect cannot be reached by a demurrer. The remedy is by a motion to make the allegations more specific. *Cincinnati, H. & D. R. Co. v. Chester*, 57 Ind. 297; *Hawley v. Williams*, 90 Ind. 160; *Pennsylvania Co. v. Dean*, 92 Ind. 459. This complaint does not differ materially from the first paragraph of the complaint in the case of *Cleveland, C. C. & I. R. Co. v. Wynant*, 100 Ind. 160; 35 Am. & Eng. R. R. Cas. 328. We think the complaint states a good cause of action. *Railroad Co. v. Kitley*, *ante*, p 511; (at this term.) *Cleveland, C. C. & I. R. Co. v. Wynant Ind.*, 20 N. E. Rep. 730.

In such action it appeared that, on one side of the highway, cars extended into

it from 6 to 8 feet, and that they had been in this condition 2 or 3 weeks. Another car on the opposite side of the highway extended into it at the same distance leaving a space of between 15 to 20 feet between the cars through which persons travelling on the highway were compelled to pass. This had been the condition for 2 or 3 days. *Held*, that there was sufficient evidence to justify a finding that the employes of the defendant left the cars in the condition in which they were found when the accident in question occurred. *Cleveland, C. C. & I. R. Co. v. Wyant*, (Ind.) 20 N. E. Rep. 730.

Crossing—Horses Taking Fright at Cars.—See *Cleveland, C. C. & I. R. Co. v. Wynant*, 35 Am. & Eng. R. R. Cas. 328, note, 333; note, 32 Ib. 159; note, 28 Ib. 686; note, 24 Ib. 479; *Brown v. Eastern & M. R. Co.*, *post*.

CHICAGO AND EASTERN ILLINOIS R. CO.

7'.

HEDGES.

(*Indiana Supreme Court, March 19, 1889.*)

Crossing—Contributory Negligence—General Verdict—Special Findings.—In an action by an administratrix for the death of her interstate, it was pleaded that as one of the defendant's trains approached a town, the servants in charge of it carelessly and negligently detached the engine from the cars; that the engine was run with accelerated speed to a water tank about 50 yards west of the depot, leaving the cars to follow of their own momentum on a descending grade to the depot. The jury returned a general verdict in favor of the plaintiff, and found the following facts: The decedent had been familiar with the crossing for 10 years, and for 2 or 3 months before his death his business had taken him to the depot about the same hour that he was killed on each week day. He was on foot on his way to the depot at the time he was struck by the train, which arrived on its scheduled time. It had been the habit of those in charge of the train for 2 or 3 months before the injury, to detach the engine and run it to the water tank as was done the day of the injury. The deceased, if he had looked in the direction of the approaching train, could have seen it in time to avoid the injury. The conductor stood on the depot platform and shouted a warning to the deceased. A brakeman on the train also warned him. The brakes were set at the time of the accident, and the train was moving about four miles an hour. *Held*, that defendant's motion for judgment on the special findings of the jury notwithstanding the general verdict, ought to have been granted.

APPEAL from Circuit Court, Fountain County.

T. F. Davidson for appellant.

Nebeker & Dochterman for appellee.

MITCHELL, J.—This action was brought by Maria Hedges, administratrix of the estate of Daniel T. Hedges, deceased, against the appellant railroad company, to recover damages alleged to have resulted to the widow and children of the intestate on account of the death of the latter, which it is charged was caused by the wrongful acts and omis-

sions of the defendant. The particular wrong charged in the complaint is that on a certain date, as one of the defendant's trains approached the town of Covington, the servants of the defendant having the train in charge carelessly and negligently detached the engine from the cars; that the engine was run with accelerated speed to a water tank about 50 yards west of the depot, leaving the cars to follow of their own momentum, down a descending grade, to the depot. It is charged that the train of cars thus following passed over a highway which crosses the railway track near the depot, and that the defendant's servants negligently omitted to give any signals by ringing the bell, sounding the whistle, or otherwise, of the approach of the cars from which the engine had been thus detached, and that, in consequence of such neglect, the intestate, being unaware of their approach, attempted to pass over the highway crossing, and was run against and over; the result being that his death was caused without any fault on his part. The jury returned a general verdict in favor of the plaintiff, and in answer to interrogatories propounded they returned the following facts specially: The decedent had been familiar with the crossing for ten years, and for two or three months before his death his business had taken him to the depot, about the same hour that he was killed, on each week **Special** day. He was on foot, and was on his way to the de **findings.** pot at the time he was struck by the train, which arrived at Covington on its schedule time. The train approached from the east, while the decedent was passing southwardly along the highway toward the depot. There were two side tracks lying north of the main track upon which the train was approaching, the one lying nearest the main track being nine feet distant therefrom. Having thus summarized the facts expressly returned in answer to the first 18 interrogatories, we set out the following questions, together with the answers, in full: "(19) How far east along the main track could the deceased have seen, had he looked when he reached the south rail of the south side track? About two hundred feet. (22) Had it been the habit of those in charge of the train for two or three months before the injury to detach the engine, and run it to the water tank, as was done on the day of the injury? Yes. (23) Did the accident happen in the daytime? Yes. (24) Could the deceased, if he had looked in the direction of the approaching train, have seen it when he was on the south side track? Yes. (25) Could the deceased have seen the train, if he had looked, in time to have avoided the injury? Yes. (27) Did the train conductor stand on the depot platform, and shout a warning to the deceased? Yes. (32) Was there a brakeman on the car next to the forward car of the train? Between the second and third cars. (33) Did this brakeman shout a warning to the deceased while deceased was on south side

track? Yes. (35) Were the brakes on the front car set against the wheels from the time the engine was detached until the deceased was struck? Yes. (38) At what rate of speed was the train approaching the crossing? About four miles an hour." Other answers returned by the jury show that the decedent approached the crossing with his head down; that he was probably giving attention to the engine, which had passed some minutes in advance of the train, from which it had been detached, and which was at the water tank, some 240 feet west of the crossing. The fifty-fifth question and answer were as follows: "What was there to prevent the deceased from seeing the approaching train when he had reached the south rail of the south side track? Nothing." There were other answers, but none which in any way qualified or mitigated the force of those above set out.

The only question we deem it necessary to consider is whether or not the court ruled correctly in overruling the defendant's motion for judgment on special findings notwithstanding the general verdict. We quite agree with all that is said in support of the ruling below, concerning the scope and effect of the general verdict, and the necessity that there should be an irreconcilable conflict between it and the facts specially found, before the latter will prevail over the former. The general verdict must be regarded in the first instance as affirming the truth of each and every proposition or fact necessary to support the general conclusion arrived at, and every reasonable presumption will be indulged in its favor, while nothing will be inferred or presumed in aid of the special findings, as against the general verdict. *McComas v. Haas*, 107 Ind. 512, and cases cited; *Rice v. Manford*, 110 Ind. 596.

When the jury are required by direct and unambiguous questions to return answers pertinent to the particular facts in issue, each answer, unless it is clearly inconsistent with some other relating to the same subject, is to be regarded as stating the exact truth in respect to the particular fact or proposition embraced by the question; and when it appears by the answers, construed together, that the facts, or some one of them, essential to support the general verdict, are directly inconsistent and in irreconcilable conflict with the general verdict, it becomes the plain duty of the court to accept the facts specially found as true, and to render judgment accordingly. *Frank v. Grimes*, 105 Ind. 346; *Cox v. Ratcliffe*, 105 Ind. 374.

It has often been decided that, in actions such as this, the burden of truth lies entirely on the plaintiff. Two propositions, one affirmative and the other in a sense negative, must be established by him. It is for the plaintiff to show either directly or by the facts

**Motion for
judgment on
special
findings
notwith-
standing
general
verdict.**

**Burden of
proof lies on
plaintiff.**

and circumstances surrounding the occurrence, that the accident which caused the death of the intestate happened through or on account of the negligence of those for whose acts the railroad company was responsible, and that the injury resulted solely from their negligence, to the extent, at least, that the intestate was not himself guilty of any negligence which directly contributed to the result. *Tolman v. Syracuse, B. & N. Y. R. Co.*, 98 N. Y. 198; 23 Am. & Eng. R. R. Cas. 313.

If the injury resulted from the joint or concurring negligence of both parties to the transaction, it was not in legal contemplation the negligence of the railroad company which caused it and the plaintiff must fail. *Cincinnati, H. & I. R. Co. v. Butler*, 103 Ind. 31; 23 Am. & Eng. R. R. Cas. 262; *Indiana, B. & W. R. Co. v. Greene*, 106 Ind. 279; 25 Am. & Eng. R. R. Cas. 322; *Indiana, B. & W. R. Co. v. Hammock*, 113 Ind. 1; 32 Am. & Eng. R. R. Cas. 127; *Davey v. Railway Co.*, 37 Eng. Rep. (Cook's notes) 606.

Concurring
negligence
of both
parties.

Conceding, as we do, that the jury might well have found that the railroad company was negligent in detaching the engine from the cars, and in increasing its speed, so as to let the train drift over a highway or street crossing without any sufficient means of giving the statutory warnings (*Pennsylvania R. Co. v. McGirr*, 61 Md. 108), it nevertheless appears from the facts specially found that the plaintiff's intestate, who approached the main track on foot, could have seen the approaching cars, if he had looked, when at a distance of 900 feet from the main track, and that there was nothing to prevent him from seeing but his failure to look.

Duty of
traveller to
look for
train.

It is not only a settled rule of law, but it is one of the plainest dictates of ordinary prudence, that one about to go upon or across a railroad track must use the means available to him for the purpose of ascertaining whether he may do so in safety; and it is as well settled as anything can be that, unless the conduct of the railroad company was such as to mislead or prevent a person about to go upon the track from looking, or to throw him off his guard by inducing him, by some affirmative act, to believe that he can cross in safety without observing such precautions, his failure to look or listen will be regarded as negligence *per se*. "No one can be said to be in the exercise of due care who places himself upon a railroad track without the assurance from actual observation that there is no approaching train." "A railroad crossing is a place of danger, and common prudence requires that a traveller on the highway, as he approaches one, should use the precaution of looking to see if a train is approaching. If he fails to do so, the general knowledge and experience of men at once condemn his conduct as careless." One thus entering upon a railroad track cannot

recover for a resulting injury, even though the company may have neglected its duty also. *Tully v. Fitchburg R. Co.*, 134 Mass. 499, 14 Am. & Eng. R. R. Cas. 682; *Butterfield v. Western R. Corp.*, 10 Allen (Mass.), 532.

Where a railroad crosses a public highway upon the same grade, the situation is itself a warning, and an incentive to one about to cross to exercise vigilance to the full extent of his opportunities, in the use of his senses of sight and hearing, in order to assure himself whether or not a train is approaching, so as to avoid collision; and, when it appears that collision might have been avoided by the use of readily available precautions, there remains no ground for a recovery, unless an excuse be shown for such an extraordinary omission. *Brown v. Milwaukee & St. P. R. Co.*, 22 Minn. 165; *Abbott v. Chicago M. & St. P. Co.*, 30 Minn. 482; *Mynning v. Detroit, L. & N. R. Co.*, 31 N. W. Rep. 147, 28 Am. & Eng. R. R. Cas. 665. "A man must use his senses, and is not excused where he fails to discover the danger, if he has made no attempt to employ the faculties nature has given him." *Lake Shore & M. S. R. Co. v. Pinchin*, 112 Ind. 592, 35 Am. & Eng. R. R. Cas. 383.

Conceding that it was the duty of the intestate to look before going upon the track, unless he had some valid excuse for not doing so, it is nevertheless contended that he did not directly appear by the special finding that he did not look; and hence it is argued, in effect, that, the contrary not appearing in the special finding, it is the duty of the court to presume, in support of the general verdict, that a valid excuse was shown for not looking. The jury having found that the intestate could have seen the approaching train in time to have avoided injury if he had looked, and that there was nothing to prevent his seeing the train when it was 200 feet distant from the crossing, if he had given attention and looked in that direction when he was 9 feet away from the main track, the fact that he stepped on the track immediately in front of a moving train raises the presumption that he either did not look, or that he deliberately took the risk of attempting to cross notwithstanding the approach of the train. In either case a recovery is impossible. The law presumes that one having the ordinary sense of sight must have seen that which was within the range of his vision, if he gave attention and looked; and if he saw the train approaching, and pursued his way notwithstanding, he is to be regarded as taking the risk upon himself. *Cones v. Cincinnati, I. St. L. & C. R. Co.*, 114 Ind. 328, and cases cited.

The special findings, therefore, necessarily exclude the idea that the intestate looked before going upon the track, in such a sense as to rebut the presumption of negligence, and they affirmatively

show that he stepped in front of the moving cars, while in a state of apparent abstraction or indifference to the perils of the situation, and regardless of the warnings and outcries of the conductor and brakeman. Such conduct the law pronounces negligent. *Woodard v. New York, L. E. & W. R. Co.*, 106 N. Y. 369, 32 Am. & Eng. R. R. Cas. 137; *Rogstad v. St. Paul, M. & M. R. Co.*, 31 Minn. 208, 14 Am. & Eng. R. R. Cas. 648; *Tolman v. Syracuse, B. & N. Y. R. Co.*, *supra*.

Moreover the special findings affirmatively show that the intestate was not thrown off his guard or misled by anything that occurred on the occasion of the accident. He had been accustomed to go to the depot about the same hour every day for two or three months, and the defendant had habitually detached the engine from the cars, as it did on the day of the injury. Nothing occurred, therefore, on the day of the accident with which he was not entirely familiar. Besides, the findings show that the engine had passed over the crossing several minutes before the train, which approached at the rate of four miles an hour, arrived. His attention was not distracted by one train following so close upon another without warning as to mislead him or throw him off his guard, nor did he enter upon the track after looking, influenced by an appearance of safety created by the company, as is the case when a flagman invites a traveller to cross. It is quite true that one may be excused from looking when a flagman, or other person employed by the company whose duty it is to look out for approaching trains, signals that it is safe to cross, and so one who approaches on a public highway, and uses such opportunity as the situation affords to look and listen, is not to be charged with negligence as against a railroad company, which by its neglect to give the required signals, led him into danger. *Chicago & E. I. R. Co. v. Boggs*, 101 Ind. 522, and cases cited; 23 Am. & Eng. R. R. Cas. 282; *Greany v. Long Island R. Co.*, 101 N. Y. 420, 24 Am. & Eng. R. R. Cas. 473.

**Plaintiff
not misled
by de-
fendant.**

The facts found make the present a case of an entirely different complexion from those relied on. While nothing is to be taken by mere inference or intendment in aid of special findings, as against a general verdict, they are nevertheless to be fairly construed with a due regard to the issues and the burden of proof in the case, and if, after being thus construed, it is apparent that they establish facts which, if taken as true, defeat the plaintiff's right of recovery, the judgment should be for the defendant, notwithstanding the general verdict may have affirmed a right of recovery in the plaintiff. The present is such a case, and it follows, therefore, that the court erred in rendering judgment for the plaintiff over the defendant's motion.

The judgment is reversed, with costs, with instructions to the

court below to sustain the appellant's motion for judgment on the special finding of facts, and to render judgment accordingly.

Personal Injuries—Negligence—Sufficiency of Evidence.—In an action to recover damages for the death of plaintiff's son, a boy of 10 years of age, it appeared that the boy was first seen at some distance from a crossing at a place where persons do not usually cross, and where the company was not bound to use unusual precautions. It did not appear whether he was struck by the train or was injured in an attempt to get on the cars. The latter seemed to be the more probable, from the fact that when he was seen, he appeared to be rolling or dragged under a car which was located about the middle of the train. *Held*, that the evidence was insufficient to establish any liability on the part of the company. *Ogden v. Pennsylvania R. Co. (Pa.)*, 16 Atl. Rep. 353.

CLOSE

v.

LAKE SHORE AND MICHIGAN SOUTHERN R. CO.

(*Michigan Supreme Court, February 8, 1889.*)

Crossing—Obstruction of Highway—Evidency—Competency.—In an action to recover damages for personal injuries sustained while driving across defendant's railroad, the negligence charged consisted in so leaving cars standing upon a street 80 feet wide that a space of only 24 or 25 feet was left for crossing. A witness for the defendant, who was in the defendant's employ at the time of the accident, was asked on cross-examination if he gave his opinion at the time that the company was careless in leaving the cars where they did. *Held*, that the question was irrelevant and incompetent.

Same—View by Jury—Alteration of Premises—Evidence.—A view of the premises was ordered and taken. At the time when the jury were upon the ground, cars had been placed upon the track with a view of representing the situation as it was at the time when the accident occurred. The plaintiff sought to prove by the officer in charge of the jury that the cars were not the same, and that their situation was different from what it was at the time of the accident. *Held*, that the plaintiff might competently do so.

Same—Speed of Train—Other Trains—Rebutting Testimony.—Some of defendant's witnesses testified that the train which injured plaintiff ran at a very slow rate of speed. Other witnesses of the defendant testified that the rate of speed was the same as it had been during the previous 10 days when making the crossing. *Held*, that evidence offered by plaintiff in rebuttal tending to show what such rate was during the previous 10 days, and that it was at a high rate during all that time was competent and should have been received.

Same—Due Care—Obstruction of View—Instruction.—When the evidence tends to show that the view of a person approaching a railroad crossing was so obstructed by freight cars placed upon a side track and partly obstructing the street that he could not see or hear an approaching train, although he stopped his horse, and looked and listened for any train that might be approaching, and used all reasonable care and caution before attempting to cross the track, the plaintiff is entitled to an instruction that, under such circumstances, he is entitled to recover, and it is error for the court merely to charge that such circumstances show that the plaintiff was not guilty of contributory negligence.

Same—Duty of Company—Degree of Care—Instruction.—In an action to

recover damages for personal injuries where the negligence charged on the part of the company is the permitting of freight cars to stand upon a side track so as to partially obstruct a street 80 feet wide and leave a space of only 24 or 25 feet for crossing, the plaintiff is entitled to an instruction, "that the defendant company had no legal right to block up the view of its track at the crossing by leaving freight cars standing upon a side track, which is adjacent thereto, and it could not, if such freight cars obstructed the view and rendered the crossing more dangerous to travellers, excuse any want of extra care it may have been guilty of to guard against accidents, by any claim that no statute law is violated by so doing which required any additional warning because of such cars being so left in the way of the traveller's sight."

ERROR to Circuit Court, Allegan County.

Action by Charles Close against the Lake Shore & Michigan Southern R. Co. to recover damages for personal injuries sustained by the plaintiff through defendant's negligence. The plaintiff brings error to review a verdict and judgment for defendant.

Jacob V. Rogers (*A. J. Mills*, of counsel) for appellant.

Dallas Bondeman for appellee.

SHERWOOD, C. J.—The plaintiff in this case seeks to recover against the defendant for personal injuries claimed to have been received by him while attempting to cross the defendant's track on Broad street, in the village of Plainwell, in the county of Allegan, on the 6th day of September, 1886. It is his claim that, then and there, without any fault on his part, he was struck, while attempting to make the crossing with his horse and wagon, by an engine of the defendant running at a very high rate of speed, thrown from his wagon upon the ground, and seriously injured, and his wagon was completely destroyed; that such injury to his person and destruction of his property was occasioned entirely by the negligence of the defendant and its employers. There was a side track on defendant's road at this crossing, and the defendant's depot was not far distant. The grounds in the locality were comparatively level. The Grand Rapids & Indiana Railroad also crosses the defendant's road, not far from the place where the injury occurred. The street which the plaintiff was travelling, where the defendant's road crosses it, was eighty feet wide. Beside the defendant's main track upon which the train was passing, and on the southwest side thereof, was its side track. This was filled with box cars on either side of Broad street, leaving an open space on the street of only 30 or 32 feet between, on which teams could pass; thus obstructing the street on either side of this passage from 24 to 25 feet, and, as the train was passing, the evening the accident occurred, from the southeast, there were buildings and other structures, which are claimed to have prevented a view of the train as it approached the crossing. It is for the negligence of the defendant in thus obstructing the highway with its cars upon

Facts.

its side track, and running its train at so high a rate of speed across this highway, that the plaintiff relies upon for a recovery. The case was tried before a jury in the Allegan circuit, and the defendant obtained a verdict. Plaintiff brings error.

The errors assigned upon rulings in taking the testimony will be first noticed. S. G. Scott was sworn for defendant, and testified that he saw the accident when it occurred:

Evidence— that he was in the employe of the company at the
Opinion as to time, and gave somewhat the details of what occurred.
defendant's He was asked, on cross-examination, if he (witness)
negligence. gave his opinion at the time that the company was
 careless in leaving the cars where they did, and did not
 say to plaintiff it was carelessness. This was objected to as in-
 competent and irrelevant, and the testimony was rightly ruled out
 for that reason.

The station agent of Lake Shore road stated upon the stand that he had looked and listened when cars were passing at the place where the plaintiff testified he did not hear or see the train as he approached the track when injured.

Evidence—
Photographs He was then asked what was his observation with
of place of reference to the coming train, which was objected to
accident. as immaterial. He also testified that he had arranged
 the cars as they were when the plaintiff came upon
 the track for the purpose of having them and the situation photo-
 graphed, and was asked, "About how long ago was that?" which
 was also objected to as immaterial. We see no objection, or
 ground of objection, to either of these questions, nor to any
 others relating to the photographs, or to the taking of them, nor
 to taking the jury to Plainwell to view the premises, nor to the
 discussion had before the court about the matter in the presence
 of the jury. The testimony relating to the photographs, and the
 photographs taken, were ruled out of the case by the circuit judge
 upon the trial afterwards, so that no harm could come from the
 ruling if wrong.

There was some testimony offered by the plaintiff in rebuttal when witness Finch was upon the stand, and which was excluded by the court, which it is more difficult to dispose of.

View by jury— It appears from the record that up to this time the
Alteration of defendant had offered testimony as to the situation of
condition of the premises at the time plaintiff was injured, including
premises. the situation and number of the cars upon the side track,
 and that upon his motion a view of the premises by
 the jury had been ordered and taken; that the night before, and
 at the time the jury were there, cars had been placed upon the
 side track, with a view undoubtedly of representing the true situ-
 ation as it was when the accident occurred. The plaintiff asked
 the witness, (with a view of showing that the cars were not the

same, and that their situation was different from what it was at the time of the accident:) "State if you noticed any freight cars upon the side track there." The witness was the officer who accompanied the jury to the place where the view was taken. The fact there endeavored to be shown was the distance of the freight cars from the street, and defendant objected to the testimony as irrelevant and immaterial. The changed situation was certainly competent to be shown then, if at all. It did not exist when plaintiff was making out his main case, and was therefore in its character rebutting. Counsel for defendant insisted that the distance of the cars from the street was within the observation of the jury. There is no evidence, however, that they took any notice of this distance at all, or that their attention was challenged to it at the time they took their view. Whether this was so or not can make but little difference, as the witnesses were to be governed by the testimony given in the case in open court, where the parties may have an opportunity to test its credibility and correctness by examination, under well-established rules of testimony. The object in allowing the jury to take a view of the place where the accident occurred was not to furnish evidence upon which they were to give their verdict, but that they might better understand and apply the evidence given in open court in determining the issues presented. *Chute v. State*, 19 Minn. 271, 281, (Gil. 230;) *Brakken v. Minneapolis & St. L. R. Co.*, 29 Minn. 7 Am. & Eng. R. R. Cas. 593; *Close v. Samm*, 27 Iowa, 503; *Wright v. Carpenter*, 49 Cal. 609.

In this same connection may be very properly noticed the ruling of the court in rejecting the testimony of plaintiff offered to be given by him in answer to the following question: "Could you see them [meaning the cars in the train, as he afterwards noticed them at the point where he stopped and listened just before he was hurt] in coming down from where you stopped to listen when they were coming down this side of the target?" Objected to as irrelevant, immaterial, and incompetent. The objection was sustained. We are inclined to think this testimony was competent. It was an item competent in making up his experience as to his ability to have seen the train which injured him in time to have avoided it. This was both relevant and competent, and its rejection might have been harmful error. At any rate, we have no means of determining that it was not, and in such case our duty is plain, and we must hold it was error to reject the testimony.

**Testimony
of plaintiff
as to ability
to see train.**

The plaintiff gave testimony tending to show that defendant ran its train over the crossing where the injury occurred at a high rate of speed. Some of defendant's witnesses testified that it ran at a very low rate of speed, and others of defendant's witnesses

testified that the rate of speed was the same as it had been during the previous 10 days when making the crossing. Plaintiff, in rebuttal, offered to prove what such rate was during the previous 10 days, and that it was at a high rate during all that time. This was competent rebutting testimony. It certainly tended to show at least that defendant's witnesses who testified to a low rate were mistaken. The rate of speed at which the crossing was made was certainly a material question in the case. *Klanowski v. Grand Trunk R. Co. of Can.*, 57 Mich. 525, 2 Am. & Eng. R. R. Cas. 648.

One of the complaints plaintiff makes is that the defendant obstructed the highway at the crossing in such manner as to shut out the view and sound of the passing train, and for this reason he was not warned of the danger that overtook him, and his counsel asked the court to give the jury the following instruction upon this point: "That if they find from the evidence that on the 6th day of September, 1886, the plaintiff was driving his horse and wagon over Broad street, in the village of Plainwell, towards the Grand Rapids & Indiana depot, and was compelled to cross the track on the Lake Shore & Michigan Southern Railway in so doing, and that upon approaching that track he checked up his horse, and looked and listened for any train that might be travelling thereon, and used all reasonable care and caution before attempting to cross said track, in view of the situation of the crossing at the time, and the dangers surrounding it, and that he was unable to see or hear an approaching train because of the obstruction caused by the freight cars placed upon the side track adjacent thereto, and that under such circumstances, and in so attempting to cross said track, without fault on his part, he was struck and injured by defendant's train, he would be entitled to recover." We see no objection to this request. It was not, however, given as requested. The court stated to the jury that these facts would show the plaintiff not guilty of contributory negligence, but we think they go further, and that under such circumstances, unexplained or modified, the plaintiff would be entitled to recover, and the court should have so charged. The railroad company had no right to make storage ground of the highway for its freight cars, and thereby increase the danger upon the crossing without giving in some manner notice thereof, and furnishing additional warnings. Substantially this doctrine was laid down in *Klanowski v. Grand Trunk R. Co. of Can.*, 57 Mich. 525, 21 Am. & Eng. R. R. Cas. 648; *Guggenheimer v. Lake Shore & M. S. R. Co.*, 57 Mich. 488, 32 Am. & Eng. R. R. Cas. 89,— and I have no doubt of the correctness of the views therein expressed, and therefore think the court should

have given the plaintiff's eleventh request, as follows: "That the defendant company had no legal right to block up the view of its track at the Broad street crossing, by leaving freight cars standing upon the side track adjacent thereto, and it could not, if such freight cars did obstruct such view, and render such crossing more dangerous to travellers having occasion to pass over it, excuse any want of extra care it may have been guilty of to guard against accident by any claim that no statute law is violated by so doing, which required any additional warning because of such cars being so left in the way of the traveller's sight; for the law imposes the duty of extra watchfulness without statute, both upon the company and the traveller in the highway in such cases." This was not given; neither do we find the substance of it given in the charge. For the errors herein referred to the judgment should be reversed, and a new trial granted.

MORSE, J., concurred with SHERWOOD, C. J. LONG, J., concurs in the result.

CAMPBELL, J. (*dissenting*).—There are only two allegations of failure of duty in this case,—one is that defendant was bound to keep cars away from its side track for a reasonable distance from the crossing of the road where the accident happened; the other is that defendant should not run its cars at that place at a high rate of speed. It is not averred in the declaration that any cars were on the crossing or obstructed it. The effect complained of was that the cars on the side track obstructed the view of cars approaching from one side, and this would not be the case with those immediately at or in the highway, and no such point is made in the declaration. The whole dispute is within a very narrow compass. There is nothing which needs consideration in the rulings on testimony and other interlocutory proceedings. The only real questions are upon the submission of the cause to the jury. The charges asked were in close accord with the two grounds in the declaration. The charges given laid down rules requiring some duties not asserted in the declaration, and not alleged to have been violated. The accident happened near the depot at Plainwell station, not very far away from the Grand Rapids & Indiana crossing. The road called "Broad Street" is crossed by defendant's railroad with a main track, and a side track near by. On this side track freight cars stood, which extended a little way over the highway line, but not to the travelled way; and, as already stated, nothing in the declaration makes any point on this proximity to the wagon road, except that the cars should be kept, not only away from that, but away from so much of defendant's own premises as approach it within what the declaration calls a reasonable distance. Plaintiff, in broad daylight, and

about 5 o'clock in the afternoon of the 6th of September, or nearly an hour and a half before sunset, was in a single wagon, taking several boxes of celery to the cars for shipment. He had been familiar with the surroundings for a long time, and in the season made these shipments, as he states, in person, as often as once or twice a week. As his testimony states, he had a horse a little above medium weight, and rather slow in his gait, and went on a trot along the plank-road, of which the track was 14 feet wide, until he got, as he says, within about a rod from the side track, when he checked the horse to a walk, and looked and listened, but noticed nothing. The nearest car was a few feet from the wagon track. As the horse's head got beyond the side track, he saw the train within a very short distance, and sprang and got across ahead of it, but the wagon was struck, and broken badly, and plaintiff thrown several feet, and hurt. He was not conscious at the time of any very serious injury, and after he was up again he testifies to making a series of measurements of distances of cars and other objects at the place of the accident. The cars were on usual time, and he said he supposed they were coming about that time, and looked down Bridge street to see if they were in sight, but did not discover them. There is no charge and no claim that they failed to ring the bell and blow the whistle properly, and there is nothing to indicate any unusual speed, which seems to have impressed the jury to that effect. There was therefore a very plain question of contributory negligence, which was not laid before the jury in any way prejudicial to the plaintiff, or seriously complained of, and the further question of defendant's negligence. The directions asked for by plaintiff were open to the double objection that they asked the court to hold defendant responsible, without regard to negligence, from the mere fact that the side-tracked cars obstructed the view, and prevented plaintiff from seeing the train. The first charge asked does not even involve the condition that the plaintiff did not in fact hear the train, and did not negative the use of other adequate precautions. The third, in like manner, entirely omitted the element of defendant's negligence. The tenth, which asserted the duty of defendant to use extra precautions, was not only not supported by any allegation in the declaration, but was given in the court's charge with much fulness and precision, in quite as strong a way as plaintiff could ask. The eleventh is similar. The thirteenth, on the subject of the plaintiff's duty, was practically, upon his testimony, a charge that he did all he was required to do. This was properly and fairly left to the jury by the general charge. In that charge the court told the jury, over and over, and very explicitly, that if the placing of the freight cars or running of the cars at the speed used involved any more than usual risk, or any risk, it was defendant's duty to use addi-

tional precautions adequate to the risk involved. The whole charge was favorable to plaintiff if he had any reasonable cause of action, and, if it erred in any direction, it was not against the plaintiff. Whether the jury found the plaintiff negligent, or the defendant not negligent, or both, does not appear. But the charge was remarkably clear, and entirely fair to plaintiff. It cannot be held as matter of law that freight cars cannot be placed anywhere on the premises which belong to a railroad company; and it cannot be held that in all cases, and without regard to circumstances, trains must be run at any particular rate of speed not fixed by law or regulation. The court laid down the only admissible condition that the precautions must be proportioned to the circumstances, and held that these were not limited by fixed legal regulations, but must go beyond those, if necessary. Whether in the present case the rules laid down were not more sweeping than the pleadings and proofs called for, we need not enquire, for the jury found for defendant. I think the judgment should be affirmed.

CHAMPLIN, J., concurred with CAMPBELL, J.

HEANY

v.

LONG ISLAND R. CO.

(New York Court of Appeals, January 15, 1889.)

Crossing—Contributory Negligence—Obstruction of View—Nonsuit—Where the evidence in an action to recover damages for the death of plaintiff's decedent shows that at the time of the accident the smoke from a train which had just crossed the highway settled down behind it upon the road; that the plaintiff attempted to cross without waiting for the disappearance of the smoke; and that the defendant was not guilty of negligence in failing to give any statutory signal, it is error to submit the question of the plaintiff's contributory negligence to the jury, and to refuse to order a nonsuit. DANFORTH, J., dissenting.

APPEAL from General Term of the Supreme Court, Second Department.

Action by Rose Heany, as administratrix of her deceased husband, against the Long Island R. Co. to recover damages for negligently causing the death of the plaintiff's intestate. The defendant appeals from a judgment entered for the plaintiff and affirmed by the general term on appeal.

37 A. & E. R. R. Cas.—34

E. B. Hinsdale for appellant.

Horace Graves for respondent.

GRAY, J.—At the close of the plaintiff's case the defendant's counsel moved for a dismissal of the complaint, on the ground that the plaintiff had failed to show negligence on the part of the defendant, and that the evidence proved that the de-

Statement of case. ceased had by his negligence contributed to the accident. This motion was denied by the court, and at the close of the whole case, the motion for a nonsuit was denied.

On appeal, the judgment entered for the plaintiff on the verdict of the jury, and the order denying a new trial, were affirmed.

We are unable to discover from the evidence that the plaintiff either established her right to recover against the defendant for the death of the intestate, or that there is sufficient proof in the case to sustain a recovery, and we think the denial of the motions was error for which this judgment must be reversed. A brief review of the facts will make this conclusion sufficiently clear. The accident occurred at a point on Atlantic avenue, in the city of Brooklyn,—a street which, for some distance there, runs in a straight line east and west. An opening in the fences of the defendant, which border its tracks on either side, permits crossing by persons on foot. At this point the avenue is one hundred feet in width. The deceased left his house, which was on Atlantic avenue, about 6 o'clock in the morning, in the month of May, and started to cross the defendant's tracks at that point of crossing. The morning was, according to plaintiff's evidence, cloudy and rainy or drizzly. A train had just passed on the south track, which was nearest to the deceased as he went through the fence, and the smoke from its engine appears to have settled down behind it upon the road, sufficiently to temporarily obscure objects in the line of vision. The deceased, however, appears to have gone ahead, and, while upon the north track, was struck by a west-bound train, and killed.

He was about 66 years of age, and his hearing was somewhat impaired. Whether the engineer sounded the whistle or rang the bell is a fact in dispute; but it is not one material to be considered, as there was no statutory obligation resting upon the defendant to give notice in either way, while operating its road at that point. It was not legally required to give such notice by any statute; nor did any ordinance demand it. By chapter 187, Laws 1876, the defendant was authorized to operate its railroad on

Atlantic avenue, subject to such rules and regulations as to rate of speed and public safety as the common council should prescribe. That municipal body directed the construction of the fence on either side of the defendant's tracks, with openings and crossings

at every street, and spaces at intervals of not exceeding 250 feet, to allow the crossing of persons on foot. They prescribed it as a duty of the company to station a flagman at certain points, of which the point in question is not one; and they authorized the defendant, after compliance with these precautionary provisions, to run at any rate of speed. The defendant in this case seems to have violated no duty to the public, based on the existence of any rules or regulations, in not having any flagman at the crossing; or in not causing notice to be given of the approach of its trains; or in running at the rate of speed testified to as being 20 miles an hour. If, then, not liable to the charge of negligence on such grounds, on what ground can it be deemed to have been in anywise derelict? The general term do not point to any act of omission or of commission by the defendant, from which negligence and a consequent liability might be inferable; but they say only that they think "it was a question of fact for the jury to determine whether, under the circumstances of the case, the company exercised reasonable care and prudence in what they did, and whether its neglect caused the injury complained of." This seems somewhat obscure as a reasoning upon the case, in the absence of some positive facts constituting or tending to prove neglect or heedlessness on the part of the defendant. While it is perfectly true that negligence may be made out from the proof of all of the surrounding circumstances, including the absence of signals and the rate of speed, yet, unless there is something in that proof, taken as a whole, which, if believed by the jury, would establish a failure on the defendant's part to perform a legal duty, or to use reasonable care and prudence in what it did, the case should not be submitted to them.

In *Grippen v. New York Cent. R. Co.*, 40 N. Y. 34-47, cited by the court below in their opinion, WOODRUFF, J., said, in discussing what constitutes negligence: "Some acts are so clearly free from imputation of that sort that it would be the duty of the court, as a matter of law, to hold that they constituted no proof of negligence; while, when the facts themselves are in dispute, or upon the proofs their wisdom or efficiency is doubtful, the jury must decide whether negligence was proved." This is a fair statement of the rule. There is in this case no dispute as to material facts. The defendant's servants were not operating the train of cars at an unauthorized rate of speed. No flagman was required to be at the crossing, and no signal was called for at that point. As to the general management of the train, the case is without any proof of any fault in that respect. The respondent's counsel does not intimate that because there was smoke upon the road at that point, and it was therefore impossible for the engineer to tell what was passing on the other side of it, he should have given some alarm or signal. But how can it be said that

any obligation rested upon the engineer to give any signal? He certainly was not bound to exercise his imagination, and to apprehend danger to some reckless person. It would be unreasonable to hold the defendant to the duty to give a signal of the approach of its trains to the frequent openings in the fence, directed to be constructed for the convenience of the public, under the circumstances of the present case, which, of their own force, call upon a person for the exercise of his reason, and the use of his senses in its avoidance.

The rules which, by frequent adjudications, have been established in cases of negligence, rest upon reasonable foundations. Where it is sought to hold another liable for the damage occasioned by some alleged negligent act, the negligence is to be made out by some positive proof, or by proof of circumstances from which the jury may fairly infer the existence of the negligence. But we think from the proofs that the intestate was, as matter of law, guilty of contributory negligence in his conduct, which contributed to the accident. According to the plaintiff's evidence, the deceased, after entering through this opening in the fence, upon the defendant's track, went straight ahead, regardless of the smoke which was between him and the track on which he was struck. The court below reason upon this act, and say that they should hold it was the duty of the deceased to stop until the temporary obstruction of the smoke had passed away, if he could be held to know that the obstruction existed. This is a distinction which is perhaps somewhat metaphysical, and not altogether clear to the comprehension. We think it was unquestionably his duty to await the disappearance of the smoke, and thus to be reasonably sure that he had a clear crossing. The deceased could see, and it is hard to understand how the existence or presence of the smoke as an obstruction could have been the subject of speculation or of a mental question. If it was indistinguishable as a body, it could no more have obstructed the vision than would the usual conditions of the atmosphere. If it was a body, perceivable, as contrasted with other objects, it was to a greater or less extent an obstruction or embarrassment to the vision. Visual perception of objects involves a consciousness of their appearance. We cannot think of appearance except as something seen. Philosophy teaches us that our knowledge of the external world is phenomenal; that is, that the things of which we are conscious are appearances. Thus, to say that the deceased may not have known that the smoke was an obstruction, involves the proposition that he may not have been conscious of the appearance of a condition of the atmosphere distinguishable from its other or usual conditions, which is so unreasonable that habit disables us from understanding it.

We think it perfectly clear that, if the plaintiff's evidence is to be believed, the deceased voluntarily went upon the tracks—always a situation involving peril, and calling for the vigilant exercise and use of one's senses—when the clouds of smoke made or tended to make objects indistinguishable. Where a person voluntarily places himself in a position of peril, under circumstances which render him less able to protect himself by the use of his senses, he cannot fairly be deemed competent to complain of a consequent injury as due wholly to the acts of the other party. The plaintiff's proofs leave no other conclusion possible than that the deceased had failed to observe those usual precautions which the law requires of those who approach a place of peril. They must be on the alert, and vigilant in the use of their eyes and ears, and display that prudence of conduct which the situation dictates. On the other hand, as has been seen, there were no acts of the defendant, or of its servants, which were open to the imputation of negligence.

It follows from the views expressed that the judgment below must be reversed, and a new trial had, with costs to abide the event.

All concur, except DANFORTH, J., dissenting.

PALMER *et al.*

v.

NEW YORK CENTRAL AND HUDSON RIVER R. CO.

(*New York Court of Appeals, January 15, 1889.*)

Crossing—Contributory Negligence—Province of Jury.—In an action to recover damages for the death of plaintiff's intestate, it appeared that the deceased was killed while driving along a highway crossed by defendant's road. The company had for many years provided gates at the crossing on each side of its track, to be shut when locomotives or trains were passing. The road consisted of five tracks, and at the time of the accident the gates were open and the flagman was absent. The deceased had passed three tracks in safety, but while crossing the fourth, was struck by defendant's locomotive, which was running from 20 to 25 miles an hour without signal. The locomotive by which the deceased was killed was much smaller than an ordinary engine, and was not designed for passenger or freight trains, but was intended for the use of the superintendent of the division in the business of the road. It was manned by an engineer and fireman, but the construction of the engine was such that the car occupied by the superintendent was over the boiler at the front end of the engine, and the engineer and fireman were behind. Their view in front was thus almost wholly obstructed, and it appeared from the evidence that neither the engineer nor fireman saw the horse or buggy until the moment of the collision. The bell, instead of being at the top of the engine, was behind, on the top of the tender, and was of a tone different from the bell ordinarily used. The locomotive moved with little noise. There was evidence enough to warrant the jury in ending that no signal was given. *Held*, that under the circumstances, and

although the plaintiff might have seen the engine, the question whether he was guilty of negligence contributing to the accident was for the jury. PECKHAM, J., dissenting.

APPEAL from General Term of the Supreme Court, Fifth Department.

The plaintiffs, William D. Palmer and another, sue as the administrators of A. H. Foster, who, while driving along a highway crossed by the defendant's road, was run over by its engine, and killed. The company had for many years provided gates at this crossing on each side of its track, to be shut when locomotives or trains were passing, and to be open at other times. At the time in question the gates were open. The case was tried at the Genesee circuit, and a verdict of \$1,819.21 rendered for the plaintiff. A motion for a new trial was denied by the trial judge, and upon appeal to the general term the judgment upon the verdict and the order denying a new trial were affirmed. Further facts are stated in the opinion.

Mr. Camp for appellant.

Tyrrell & Ballard for respondents.

DANFORTH, J.—The points made by the appellant are that the court erred (1) in refusing to grant defendant's motion for a nonsuit; (2) in refusing to charge as requested by it, viz.: "That the fact that the gates were not down was not such an assurance of safety to the intestate as obviated the necessity of using his eyes and ears to ascertain whether a train or engine was approaching, and if, notwithstanding the condition of the gates, he might have seen or heard the engine if he had looked or listened, and as he did not, the plaintiff cannot recover;" and (3) that the damages allowed by the jury were excessive, and entitle it to a new trial. The last proposition requires no consideration, for the question was exclusively for the jury and the supreme court. The motion for a nonsuit was reserved until after the defendant put in evidence to meet the plaintiff's case, and the special ground then urged was that it affirmatively appeared that the plaintiffs' intestate was guilty of contributory negligence.

It appeared in evidence that Foster, on the 24th day of May, 1884, was travelling southward with a horse and covered buggy at the rate of from four to five miles an hour, along a highway known as "Walnut Street," in the village of Batavia. The street ran north and south, and in his way was crossed by defendant's road of five tracks running east and west, at an angle with the street of 43 degrees. He passed three of the tracks in safety, but while on, and in part over, the next, was struck by defendant's lo-

**Statement
of case.**

**Appellant's
points.**

**Facts
appearing
from
evidence.**

comotive, which was running along that track westerly, "very fast," or from 20 to 25 miles an hour, and without signal. He and his horse were at once killed, and the buggy broken in pieces. This is a not unusual narrative in collision cases, but the attending circumstances were somewhat exceptional. The engine was attached to no train or car. It was small in size,—much smaller than the ordinary locomotive. It was neither designed nor used for passenger or freight business. It was running on no schedule time. It was in charge of no conductor. It carried one person,—the superintendent of the division,—and was subject wholly to his direction. It was manned by an engineer and fireman, but the construction of the engine was such that the cab occupied by the superintendent was over the boiler at the fore end of the engine, and the engineer and fireman were behind. Their view in front was thus wholly obstructed, except as the lines of vision were outside of the cab; and down and along the track they could have a sight of nothing except as they leaned out and away from their place. In fact, as each testifies, neither the fireman nor engineer saw the man, horse, or buggy until the moment of the collision. The bell, instead of being on the top of the engine, was, as some testify, behind and below it, or, as the engineer says, "on the tail end of the engine, on the top of the tender." It was of a tone different from that of ordinary locomotives, and the machine itself moved with little noise, and with less than that of a train engine. It was used for the business of the occupant, either of observation or travel, and was so constructed as to facilitate either. As its use and construction differed from that of ordinary locomotives, so did its management. Instead of obedience to the statute, which requires the bell or whistle to be rung or sounded at a given distance from the place where the railroad shall cross any travelled public road or street, and at intervals until it shall have crossed that road or street, and so makes the presence of the crossing an imperative order to the managers of the engine, it was made the duty of the engineer to blow the whistle only when notified to do so by his passenger, the superintendent, and in this instance such direction was given only when quite near the crossing; and by the time the brakes were set, and steam shut off, the engine was "upon" the interstate. The plaintiffs' witnesses show that at the same moment the bell was for the first time rung. One of them, watching the locomotive, "did not notice any bell ringing until whistle began to blow, about half way between the bridge and the crossing; then the bell rang and whistle blew." This was a short distance from the point of danger. Concerning the bell there was evidence from the engineer and fireman to the contrary, but none from the superintendent, who was not called to testify. There was evidence enough to warrant the jury in finding that no signal of any kind was given. They would have been compelled to say that

the construction of the locomotive was such as to render vigilance on the part of the employes almost, if not wholly, useless; that the position of the bell was less favorable to the distribution of sound than the place assigned to it by statute; and that the engine itself gave little or no notice of its approach. The flagman also, who for 25 years had been stationed at the crossing, was absent. This was conceded.

But, besides these things, which are to be regarded as omissions or departures from the ordinary, and in some respects required, methods of the defendant's business, in giving audible or visible signals of approach, and indicating negligence on its part, there are affirmative acts, not only compelling the same conclusion, but directly tending to influence the conduct of the wayfarer, and indeed expressly designed to do so. The defendant, "for the better protection of life," and to promote the safer and better management of its road," either of its own volition or under the command of the law (Laws 1884, c. 438, § 3), had erected gates across Walnut street on either side of its tracks, and had stationed a person there "to open or close such gates when an engine or train passed." The duty of the company was imperative, and it is obvious that an open gate was a direct and explicit assurance to the traveller that neither train nor engine was rendering the way dangerous,—that none was passing. A closed gate was an obstruction preventing access to the road; an open gate was equally positive in the implication to be derived from it that the way was safe. Nothing less could be implied, and no other conclusion could be drawn from that circumstance. The silence of the bell and whistle was an indication that no train or locomotive was within 80 rods of the crossing, the open gate an affirmative and explicit declaration and representation that neither train nor locomotive was approaching with intent to pass. The way then was open to the intestate, and, as the highway was straight, that fact was apparent to him, not only when he reached the track, but for a long distance off. He had a right to rely to a certain extent upon that representation. *Stapley v. London, B. & S. C. R. Co.*, L. R., 1 Exch. 21; *Glushing v. Sharp*, 96 N. Y. 676. It is difficult, therefore, to see how his death can be attributed to any other cause than the negligent acts of the defendant; but if there is room for a different inference, there is not enough of it to make the question one of law. He could not rush heedlessly on to danger, and throw the result upon the defendant; but the degree of care required of a traveller is increased or diminished by the greater or less probability, suggested by the circumstances about him, that without it an injury will happen. When, therefore, he moves on upon the track under an assurance of safety from those owning it, and from their servants, whose especial duty it was to keep their attention

fixed upon it, and who had within their power the means of avoiding the infliction of injury, and whose business it was to use them so as to prevent danger, it is for the jury to say whether the traveller exercised that ordinary care and prudence which, under the circumstances, it would be natural to expect. The cases above referred to (*Stapley v. London, B. & S. C. R. Co.*; *Glushing v. Sharp*), if any are necessary in support of so plain a proposition, are sufficient for that purpose. But notwithstanding the defendant by its conduct assured the intestate that no engine or train was approaching, and so invited him to go over its tracks, it is contented by the defendant's counsel that the intestate was yet bound to keep a lookout against danger; that, if he did so, he must have seen the engine in time to have avoided it: and that he either did not look, or did see the engine, and therefore went on at his peril.

The claim at the trial was that the plaintiff's negligence was affirmatively shown. There is no evidence that he did not both look and listen. The question was left to the jury by a charge to which no exception was taken, and we think the learned judge committed no error in submitting it. The evidence shows that to a traveller coming from the north the view of the railroad at the east was obstructed by apple and maple trees in full leaf, by buildings of various kinds, some belonging to the railroad company; while at the west, on track 4,—the track nearest the approaching traveller,—not far from the crossing, a freight train stood, its engine taking water, and discharging steam from the escape valves, and a stiff breeze blowing from the southwest, and so bringing the steam directly in the way. It was possible, notwithstanding, at certain points, to get a glimpse of the railroad at the east; and from lines and measurements exhibited by a surveyor and the observations of other persons, we are asked to say as matter of law that the intestate, in not seeing the engine, was guilty of negligence. The size of the engine; its construction, permitting, if seen, the inference that it was going away from the crossing, and not coming towards it; the presence of a train on the track nearest the traveller; the obstructions to the view; and above all the extended arms of the gates, and the way thus made open,—are all to be considered, and their consideration was for the jury. The conduct of the intestate might have been influenced by them, and to what extent, it was for the jury to determine. *Kellogg v. New York Cent. etc. R. Co.*, 79 N. Y. 72; *Shaw v. Jewett*, 86 N. Y. 616; *Sherry v. New York Cent. & H. R. Co.*, 104 N. Y. 652. We see no ground on which the court could say the intestate did not use reasonable care in approaching the crossing. The request to charge involves the assertion that the intestate neither looked nor listened, and so was erroneous.

Contributory
negligence—
Province
of jury.

Whether he looked or listened was for the jury to determine (Smedis' Case, 88 N. Y. 13; Kellogg's Case, *supra*), and, if they found he did not look or listen, to say whether, had he done so, it would have been possible for him to have seen or heard the approaching engine in time to avoid it (Thompson v. New York Cent. & H. R. Co., 110 N. Y. 636). If he looked and listened, it was for the jury to say whether he saw the machine on the track, and, if he did, whether by its position and appearance he was informed that it was an engine approaching the crossing, or whether, from the situation of the cab and the absence of signal, he might be led to believe it was going from, and not towards, the crossing; and whether, adding to these circumstances the open gates, he might not reasonably believe, and with ordinary prudence govern himself by that belief, that whichever way it was moving it was not intending to pass the highway. These circumstances were of the defendant's creation. They indicate not only omissions of duty which, when performed, are designed to notify the traveller of his danger, as by signal, but affirmative acts assuring him that no danger exists, as in the going off of the flagman, and the raising of the gates. I do not think the court can say as matter of law that the statutes which require signals and precautions can be disregarded by the defendant, and it be allowed to claim that the traveller should not be influenced by these omissions. While the court could not as matter of law say that the plaintiff did not look, neither would that fact, if found, enable it to say as matter of law that negligence was established. Terry v. Jewett, 78 N. Y. 338; Brassell v. New York Cent. & H. R. Co., 84 N. Y. 241; 3 Am. & Eng. R. R. Cas. In the first case an intending passenger, and in the last a passenger leaving the cars, were injured. It was held that each had a right to assume that the company would not expose him to unnecessary danger; and while he must himself exercise reasonable care, his watchfulness is naturally diminished by his reliance upon the discharge by the company of its duty to provide a safe passage to and from the trains. The duty there referred to was obedience to the common law obligation to conduct its business with reasonable care not to injure another. In the case before us we have superadded the provisions of positive law designed to regulate the conduct of corporations created by it. Effect must be given to these wise regulations concerning measures to be adopted by a railroad company for the safety of the traveller. He is not bound to wholly discredit the assurance of the servants of the company that the conditions which require those regulations to be observed do not exist. In general it may be imprudent to enter upon a track while a locomotive is approaching. Whether it is so in a particular case must depend upon the circumstances under which the attempt to cross is made. And where, though in fact it may be hazardous, a traveller does

so in consequence of the acts of the defendant, he cannot be charged with negligence unless the risk or danger was apparent. In this case the engine, although in motion, made no signal that it was to pass the crossing, but a signal was given by its owner that it was not to pass. The track and the moving engine were signs of danger, but the engine, although moving, was not dangerous, unless it passed the crossing. As to that he had assurance that it was not, from the silence of the bell and whistle, and the position and affirmative assurance from the open gates. The effect of such assurances from employes, of the nonexistence of danger, is exemplified, among many others, in the Filer Case, 49 N. Y. 47, Fry Case, 18 C. B. (N. S.) 225, where by direction of an employe a passenger left a train while it was in motion; in McIntyre's Case, 37 N. Y. 287, where under like circumstances a passenger went from one moving car to another; in the Glushing Case, *supra*, where the traveller went on the track through an open gate, under circumstances which, except for that, disclosed negligence on his part. In all these cases it was regarded as an important element in the case that the defendant had involved the plaintiff in his attempt.

The facts before us, therefore, fall short of requiring as the sole inference from them that a want of ordinary care on the part of the intestate contributed to the injury. Whether it did or not was a question depending upon all the circumstances of the case. *Johnson v. Hudson R. R. Co.*, 20 N. Y. 65. Negligence cannot be presumed, and where by the act of the defendant a person has reason to believe that he may cross the track in safety, his attempt to do so, and his lack of that vigilance which, under other circumstances, might be required, cannot be regarded as constituting negligence. He is still bound to exercise ordinary and reasonable care, but the measure of his duty varies with the peculiar circumstances of the case, and its fulfillment must be determined by the jury. This conclusion disposes of both questions raised by the appellant, and requires an affirmance of the judgment from which it appeals.

It should be affirmed, with costs.

EARL and GRAY, JJ., concur in the result.

PECKHAM, J. (*dissenting*).—I dissent from the conclusions arrived at by the court in this case. As I understand it, the uncontradicted evidence showed that there was for a distance of 70 feet before reaching the tracks a wholly unobstructed view up and down, so that any one approaching them, could, if he had looked, have seen an engine thereon in ample time to have stopped in a place of perfect safety until it had passed. Notwithstanding the fact that the gates were open, a person intending to cross the tracks

in broad daylight was not relieved from the necessity of using his eyes to make sure that he could cross in safety. Had he looked he must have seen this engine coming rapidly toward the crossing, and, if he then undertook to cross ahead of it, his failure to do so was at his own risk. If he did not see the engine it must have been because he did not choose to look, and his omission to do so was also a risk, the consequences of which he took upon himself. I think the plaintiff should have been nonsuited, and that consequently this judgment should be reversed.

GALVESTON, HARRISBURG AND SAN ANTONIO R. CO.

v.

PORFERT.

(*Texas Supreme Court, December 21, 1888.*)

Crossings—Personal Injuries—Duty of Traveller—Instruction.—An instruction that "if a person riding in a wagon could not hear the approach of a train by reason of the noise made by his wagon, and if, by stopping his wagon, he could have heard the approach of danger, it would be an act of prudence and necessary precaution to stop the wagon to enable him to listen for an approaching train," is open to the objection that it specifies what acts would have been prudent, and therefore infringes upon the province of the jury.

Same Contributory Negligence—Evidence.—When, from the plaintiff's evidence, it appears that his horses were moving, and were already across the track when he saw a train 300 feet away, approaching at the rate of 40 miles an hour, it is evident that if he had exercised the care he was bound to use under the circumstances, that he could have driven off the track before the train struck him, and as he must therefore have been guilty of contributory negligence, a verdict in his favor is contrary to the evidence.

Damages—Verdict—Double Recovery.—In an action to recover damages for personal injuries, the jury assessed damages for "peril and fright," \$833; "mental anguish," \$1,666; "pain and suffering" \$6,667. *Held*, that the sum awarded for pain and suffering consequent upon the personal injuries, included the two items for "mental anguish" and "fright," and that the verdict therefore gave a double recovery therefor.

Same—Excessive Damages—Setting Aside Verdict.—Plaintiff was under treatment in a hospital 145 days. At the time of the trial, 21 months after the accident, dead bone was still working out of the wound. His leg was partially stiffened, and was shorter than the other leg, and he was disabled for life. It had been broken, large pieces of skin were torn from the flesh, and he was bruised in many places. *Held*, that a verdict of \$14,167 was not so excessive as to require the court to set it aside.

APPEAL from District Court, Bexar County.

Action by Charles Porfert against the Galveston, Harrisburg & San Antonio R. Co. to recover damages for personal injuries caused by defendant's negligence. A verdict for the plaintiff was returned, and defendant appeals therefrom.

Waelder & Upson for appellant.

John H. Copeland and *J. H. McLeary* for appellee.

COLLARD, J.—Appellee, Charles Porfert, brought this suit on the 23d day of August, 1883, against the appellant, the Galveston, Harrisburg & San Antonio Railway Company, for damages alleged to have been caused by the negligence of defendant's servants in managing and propelling its engine and cars, by which negligence he was knocked off of his wagon while attempting to cross the railroad track and injured; "causing a compound fracture of the left leg below the knee, wounding him severely in many places, injuring him internally, and bruising him all over, from head to foot." The damages are specified and itemized as follows: "The company, by the carelessness and negligence of its servants and agents, and by the collision aforesaid, and by the wounds, bruises, and injuries aforesaid, to plaintiff done, have caused him great pain and suffering and have damaged him for life, transforming him from a hearty and robust young man to a cripple for life, to his great and irreparable damage as follows, to wit:

"To loss of time from the 23d of July to the filing of the amended petition [March 4, 1885], . . .	\$ 2,500 00
To peril and fright at the time said injuries were sustained, . . .	2,500 00
To mental anguish suffered by plaintiff in consequence of said injuries, . . .	5,000 00
To pain and suffering consequent on said personal injuries, . . .	20,000 00
To impaired capacity for labor in consequence of weakness and permanent injuries as aforesaid, . . .	20,000 00"

Plaintiff also alleges that he observed the sign, "Railroad Crossing;" that before attempting to cross he looked and listened, both to the right and left, and neither saw nor heard anything to indicate the approach of a train, and, after taking these precautions, he attempted to cross, when he was hurt as previously stated; that he was 32 years old at the time of the accident; that by reason of the injuries aforesaid he was confined to his bed six months; that he cannot be restored to a healthy and robust condition, but must henceforth be a sickly cripple, and a miserable invalid; that the defendant's engine was running at a great speed,—40 miles per hour; that no bell was being rung, nor whistle blown, at the time and distance required by law, on the locomotive, before crossing the public highway; and that all other usual and necessary precautions were disregarded, and that he was guilty of no contributory negligence whatever. Defendant pleaded not guilty, contributory negligence on the part of plaintiff by attempt-

ing to cross the railroad on a narrow and obscure lane, not exceeding 12 feet in width, without using his senses of sight or hearing, giving no heed to the whistle which was duly given by the engineer at the proper time and place; and that, if plaintiff had not long since recovered from the alleged injuries it had been through his own fault and imprudence; among other things, by voluntarily contracting a loathsome disease. It is also alleged that defendant, after the injuries, for the space of about one year, had plaintiff fed, nursed, and cared for in the best manner, and supplied with comforts, medicines, and medical attentions, at its own expense, in the sum of \$1,000, which is pleaded in set-off. As nearly as can be stated, the accident occurred as follows: About 4 o'clock in the afternoon of the 23d day of July, 1883, Charles Porfert, aged — years, was driving a two-horse wagon on the Nelson road, a public road, near the Medina river, intending to go to San Antonio. The dirt road approached the defendant's railroad from the south, and crossed the railroad about 220 yards west of the bridge on the river. The railroad here runs nearly east, and the dirt road nearly north. The wagon road on the south side runs through a lane about 22 feet in width. At the time plaintiff was driving along the road, towards the crossing, there was a brush fence on the left side of the lane, green corn growing in the field, a few trees along near the line of the fence, sunflowers and blood weeds growing in the right of way. There was a cut for the railroad through rising ground from the bridge towards the crossing, from three to four feet deep, and the waste dirt was piled or banked up in the usual way; and on these embankments and in the right of way, sunflowers and blood weeds were growing thick, and several feet high. This cut did not extend from the bridge to the crossing, but was between the two. At the crossing the track of the railroad was a little above the natural ground,—eight or ten inches; so that the pull for a wagon to the top of the track was slightly upwards. The evidence is conflicting, but it was amply sufficient to justify the jury in finding that, as plaintiff approached the railroad crossing along the lane he could not see an approaching train until he got close to the track,—within a few feet of it. At the track and on it, the road, being straight, could be seen for over a mile each way. Plaintiff had worked on this road, and was familiar with the locality. He knew the train signals, whistles, and bells. There was a whistling post at the proper distance from the crossing, and a sign at the crossing for travellers, designating it as a railroad crossing. The wind was from the south or south-east. Just before plaintiff reached the crossing—about eighteen feet from it—he stopped to have one Baden move his wagon out of the way. Baden was loading wood on his wagon from the brush fence, and his son was assisting. His son moved the wagon so that plaintiff could pass. A few words were exchanged, and

plaintiff drove on. While stopped at this point, plaintiff listened, but heard no train. He drove the horses up to the track, looked and listened again, he says, and saw and heard nothing. When the wagon was on the track, he looked, and, coming from the west, was a train, about 13 rail-lengths away—390 feet. It was a construction train—locomotive and two flat cars. He says it was running very fast; that he raised his stick, and was in the act of striking his horses, then moving and off the track, when the locomotive struck his wagon on the rear end, tearing the wagon to pieces, and causing the injuries to him as set out in the petition. The train passed on and stopped several hundred yards east, near the section house, and returned to him. He was found unconscious, about 15 steps from the cattle guard, in Baden's field. Baden says he heard no whistle or other signal until the train was crossing the lane. He then looked, and saw only the plaintiff's horses standing on the opposite side of the track, the wagon gone. The engineer and fireman on the train say the regular signals for crossing were given at the proper time, and the engineer says plaintiff, when he saw him first, had his head down, looking east; that he gave an alarm at once, reversed his engine, called for brakes, and did all in his power to avoid the collision. Plaintiff says he was driving slow, to avoid overturning a can of butter he was taking to San Antonio. Defendant produced a number of witnesses who testified that an engine and train could now be seen from nearly every point of the lane, all the way from the crossing to the bridge. The roadbed had been raised about 10 inches after the accident before these witnesses took observations; some trees had been cut away; the brush fence had in part been removed; the corn and weeds were not in the way to any extent, being younger and smaller. The employes testified that the train causing the accident was moving at a rate not exceeding 18 miles an hour, when plaintiff was first seen by them. The engineer bore a good reputation for competency, and stood well with the company. The cause was submitted to a jury April 7th, 1885. Their verdict was as follows:

"We, the jury, find for plaintiff, and assess the damages as follows:

Loss of time,	\$ 833 00
Peril and fright,	833 00
Mental anguish,	1,666 00
Pain and suffering,	6,667 00
Impaired capacity,	6,667 00

Total, \$16,666 00"

Judgment was entered accordingly, and defendant appealed and assigned errors.

The first assignment of error is as follows: "The court erred in

refusing to give to the jury the charges asked by defendant, which two special charges are marked 'Refused,' for the reason that the first thereof should have been given in view of the testimony of the plaintiff himself that he could have heard the approaching train or locomotive, if he had stopped his wagon, the noise of which prevented his hearing." The charges asked and refused were but one consecutive charge, and were as follows: "In this connection you are instructed that if a person riding in or upon a wagon could not hear the approach of a train or locomotive by reason of the noise made by his wagon, and if by stopping his wagon he could have heard the approach of danger, then it would be an act of prudence and necessary precaution to stop the wagon to enable him to listen for an approaching train or locomotive on the railroad track, and, failing to do so, he would contribute to his own injury, and thus be guilty of what is called contributory negligence, for which no one but himself would be at fault or responsible." This is the first part of the charge refused, on which the foregoing assignment of error is based, the following is the latter part of it, for the refusal of which the second assignment of error is taken: "If, therefore, the jury believe from the evidence in this case that the plaintiff failed in the exercise of ordinary and reasonable care and caution in approaching and going upon the railroad track, and that the want of such care and caution on his part contributed to the injury which he has sustained, and that by the exercise of such care and caution he could have avoided the accident by which he was injured, then the defendant is not liable, although the railroad company may not have given the signals which the law requires, and in that event your verdict should be for the defendant." The assignment of error relating to this part of the requested charge is as follows: "The court erred in refusing to give to the jury the other of said two charges, for the reason that the evidence generally, and the plaintiff's own testimony, shows that the plaintiff failed in the exercise of ordinary and reasonable care and caution in approaching and going upon the railroad track, and that the want of such care and caution on his part contributed to the injury which he sustained." The general charge of the court upon this subject was as follows: "Third. If you believe from the evidence that the plaintiff was injured, as stated by him in his petition, by the railroad train of the defendant, and that prior to said collision plaintiff used all necessary precautions to ascertain if a train was in the vicinity of the wagon road crossing, and that in fact plaintiff is guilty of no contributory negligence, and that the injury complained of was caused by the negligence of the defendant's employees in operating the railroad train of the defendant, you will find for the plaintiff a verdict for such damages as the proof shows he has sustained." "Fifth. If, however, you believe from the evidence

that the plaintiff failed in the exercise of ordinary and reasonable care and caution in approaching and going upon the railroad track, and that the want of such care and caution on his part contributed to his injury, and that by the exercise of such care and caution he could have avoided the accident by which he was injured, then the defendant cannot recover in this suit, and your verdict will be for the defendant." In addition to the foregoing, the court gave the following charge at the request of defendant: "The statute law of this State provides that a bell of at least thirty pounds weight, or a steamwhistle, shall be placed on each locomotive engine, and the bell shall be rung or the whistle blown at the distance of at least eighty rods from the place where the railroad shall cross any road or street, and to be kept ringing or blowing until it shall have crossed such road or street, or stopped, and, neglecting to do so, shall be liable for all damages sustained by any person by reason of such neglect. While this is a duty imposed upon railroad companies the performance of which the travellers may expect, yet all persons wishing to cross a railroad track at the crossing of a road are also charged with the reciprocal duty of exercising reasonable care, prudence and caution in avoiding danger in approaching or crossing the track; and the jury are therefore further instructed that a person in attempting to cross a railroad track at a crossing must use due care to avoid danger, and if he does not do so, and his own negligence is the proximate cause of the injury, he cannot recover damages for any injury received by him, although the railway company may not have given the signals which the law requires to indicate the approach of a train or locomotive. In such case he contributes to his own injury, and it is not the result of the omission of the act required by the law. It is not only the duty of one in approaching a railway crossing to look along the line of the road, and see if a train is coming; but if he fails so to do, or to listen, or to use any other reasonable means of informing himself of approaching danger, such conduct on his part, when it appears from the evidence, would amount to negligence."

We do not think the court erred in refusing the requested charge. It has been often decided that negligence or not is a question of fact for the jury. In the first part of the charge requested and refused the court was asked to instruct the jury that if plaintiff could have heard the approaching train by stopping his wagon to listen, then his failure to do so was contributory negligence. The court cannot specify in its charge what acts would have been prudent, or what imprudent; what precautions would have avoided the collision; or what would amount to negligence. The jury must be left to connect the facts in their own way; to reason for themselves, and form their own conclu-

**Negligence
in failing to
stop wagon
a question
for the jury.**

sions from the evidence without the aid of the court. The court cannot point out to them a method by which they can reach a conclusion from the evidence, or suggest to them an argument arising from the facts by which they can or must solve an issue of fact. It is the duty of the court to furnish the jury with the rules of law applicable to facts as they may find them and no more. If the law should make certain acts or omissions negligence *ipso facto*, the court should then direct the jury that the finding of such acts or omissions would be a finding of negligence; but the court would transcend its authority if it instructed the jury that the omission of an act of prudence would amount to negligence unless the law declared it to be so. The court might as well argue one feature of the case as another, and in this way argue the whole case for the jury upon the facts. The jury must be left to argue the facts for themselves, without suggestion or intimation from the court. *Texas & P. R. Co. v. Wright*, 62 Tex. 517, 518; 23 Am. & Eng. R. R. Cas. 304; *Texas & P. R. Co. v. Chapman*, 57 Tex. 82.

The error assigned for refusal to give the latter part of the charge is not well taken. The first part of the charge asked was not the law, and for that reason the last part of it could not be given. The court is not required to separate a charge into fragments, giving such portions as are the law to the jury, and refusing such as are not the law. Besides this, the court had in the section of its charge above quoted (as the fifth section) substantially given the latter part of the charge asked. The use of the word "defendant" where it is evident "plaintiff" was meant, could not, in the connection in which it was used, have misled the jury. In addition to this, the special charge asked by defendant and given by the court was as favorable to defendant as the law would warrant, upon the subject of contributory negligence. It not only stated that it was plaintiff's duty on approaching the railroad crossing to use his senses to look and listen for trains, but proceeded to declare that his failure to do so would amount to negligence. The charge given by the court of its own motion, and the special charge given at the instance of the defendant, submitted the question of contributory negligence as favorably to defendant as it could have been.

Appellant complains because the jury failed to find contributory negligence on the part of plaintiff in approaching and crossing the railroad track. It will be observed that if the plaintiff can recover at all he must do so upon his own evidence as to how the accident occurred. After stating that he stopped just before reaching the track, and exchanged a few words with Baden, he proceeds to say: "While standing in the lane, I listened, and could see no train or anything. To the east the railroad

Contributory
negligence—
Verdict con-
trary to evi-
dence.

curved. Beyond the curve could see no track on account of corn and two large wood-piles. Then I turned my head towards the river, and could see nothing that way on account of the brush fence, the hackberry tree, the bluff, a pecan tree—one limb hanging down on the bridge; don't think it is there now. I stopped and listened; could not hear anything. I drove on slowly on account of butter in a can. I went up to the iron track. Kind of a high place, where horses generally give a pull up, and sometimes don't go very fast. About the time the horses struck the track, I could not see anything to the west of me. I looked east, and could not see anything there. About that time I got on the track. Just as my body got on the track I saw a train. Had been looking east, watching the curve. The train was right on me, within thirteen rail lengths. It had not whistled then. The wind was blowing pretty strong at the time. I did not hear the bell nor whistle. After I got on the track and saw the train, the horses were off the track, north of it. My body was in the center of the track when I saw train. I raised my stick, and struck the horse with my left hand. As I struck the horse the train struck me. The train got within 13 rail lengths of me, when they happened to see me, and commenced whistling, and signaled for brakes." Again, on cross-examination, he was asked: "Where did you say you were when you first saw the train?" He answered: "On the track." "Whereabouts?" "Right in the center of the track." "And your horses were off the track?" "Off the track," he answered. "Where did you first see the train?" "About 13 rail lengths from me, this side of the tank." "Your horses were going?" "They were going; yes." It was in proof that a rail length was 30 feet. If the testimony of plaintiff is true, it is impossible that he could not have driven off the track after he saw the train, before it struck him, if he had exercised the care he was bound to use under the circumstances. His horses were moving, and already across the track. His seat in the wagon was in the middle of the track when he saw the train, 390 feet away, coming, plaintiff says, at the rate of 40 miles an hour. Under such circumstances he must have been guilty of contributory negligence in failing to cross the road before the train struck him. This conclusion is so free from doubt that we do not hesitate to say the verdict was contrary to the evidence, and it was error in the court below to refuse a new trial on that ground.

The verdict assessed damages for "peril and fright," \$833; "mental anguish," \$1,666; "pain and suffering," \$6,667. The petition claimed damages for "peril and fright at the time said injuries were sustained; mental anguish suffered in consequence of said injuries;" thus dividing the mental suffering into two periods. It might as well have been divided into as many days as the suffer-

Verdict—
Double
recovery.

ing continued. The suffering of mind was the result of one act, and, though the injury was continuing, it was but one injury. The petition also divided the damages into "pain and suffering consequent on said personal injuries," to which the jury responded as before stated. This pain and suffering is not by the petition denominated "physical" pain and suffering, so as to distinguish it from the fright and mental and anguish before set up as items of damage. We think the petition asked for, and the verdict awarded, a double recovery. The \$6,667 awarded for pain and suffering consequent upon the personal injuries included the two items of fright and mental anguish already allowed. The findings for the two previous items, \$833 and \$1,666, should both be stricken out, reducing the verdict to \$14,167. The amount of the verdict, in so far as it is double, could be here remitted, and judgment could be rendered for the \$14,167, if the verdict could be sustained at all. It cannot, however, be sustained at all, on account of reasons before given.

Appellant claims that the verdict is excessive. We are not prepared to say that an appellate court should so hold. Plaintiff's injuries were very severe. He suffered in the hospital 145 days; dead bone was at the time of the trial (21 months after the accident) still working out of the wound; the wound was still open; his leg was partially stiffened, and somewhat shorter than the other leg; and he was disabled for life; his leg had been broken; large pieces of skin were torn from the flesh; and he was bruised in many places. The verdict was large, but not so clearly excessive as to require us to set it aside after it had been approved by the trial judge. *Gulf C. etc. R. Co. v. Dorsey*, 66 Tex. 148 · 25 Am. & Eng. R. R. Cas. 446; *Texas & P. R. Co. v. Garcia*, 62 Tex. 292; 21 Am. & Eng. R. R. Cas. 384; *International & G. N. R. Co. v. Dawson*, Id. 261; *International & G. N. R. Co. v. Brett*, 61 Tex. 483; *Houston etc. R. Co. v. Randall*, 50 Tex. 254; *Texas & P. R. Co. v. Casey*, 52 Tex. 114; *City of Galveston v. Posnainsky*, 62 Tex. 120; *International & G. N. R. Co. v. Ormond*, 64 Tex. 490. 27 Am. & Eng. R. R. Cas. 139; *Texas & Pac. R. Co. v. Kirk*, 62 Tex. 233.

Because of the refusal of the court below to grant a new trial on the ground that the jury should have found that plaintiff was guilty of contributory negligence, we conclude the cause ought to be reversed, and remanded for a new trial. We have omitted to state, in the proper place, our conclusion upon appellee's motion to strike out the statement of facts submitted with the case. The stenographer's report of the testimony was in part adopted by the parties and the court as a correct statement of facts. In many instances the questions propounded to witnesses, and their answers, are given in full. This was done to give the supreme

court a better appreciation of the testimony. In so far as the questions to and answers of the plaintiff are given, we cannot say that they were unnecessary. We do not think the statement of facts in the particulars mentioned in the motion is so violative of the rules as to require us to sustain the motion. We think it ought to be overruled.

STAYTON, C. J.—Report of the commission of appeals examined, their opinion adopted, and the judgment reversed, and cause remanded.

Contributory Negligence—Stopping Wagon to Listen—See note, 32 Am. & Eng. R. R. Cas. 154.

CHICAGO, MILWAUKEE AND ST. PAUL R. CO.

v.

HARPER.

(*Illinois Supreme Court, November 15, 1888.*)

Personal Injuries—Cutting Rail—Bystander—Instruction.—Plaintiff sued to recover damages for personal injuries caused through the alleged negligence of defendant's servants while cutting off the battered end of a rail with a cold chisel. Whilst standing on the street watching the operation, a piece of iron or steel from the rail, or the hammer used in cutting it, struck the plaintiff's eye, and caused injuries which resulted in its loss. There was no evidence in the record to show that the act of cutting off the battered end of a rail with a cold chisel in the manner adopted by the railroad company, would result in throwing pieces or chips of iron through the air with such velocity as to injure a bystander. *Held*, that, as there was no evidence to sustain such an instruction, it was error to charge the jury that if the defendant's servants were cutting an iron rail with a cold chisel, and were doing this in such a manner as to throw pieces or chips of iron through the air with great velocity, so as to endanger the safety of persons on the street, and that if the jury believed, from the evidence, that this was negligence, that the plaintiff was injured thereby, the jury must return a verdict for the plaintiff.

APPEAL from Appellate Court, First District.

Action by Arthur C. Harper against the Chicago, Milwaukee & St. Paul Railroad Company to recover damages for negligently injuring plaintiff. The action was brought in the superior court of Cook County, and resulted in a verdict and judgment for the plaintiff, which was affirmed by the appellate court on appeal thereto. The defendant thereupon appealed to the supreme court.

E. Walker for appellant.

E. A. Sherburne for appellee.

CRAIG, C. J.—This was an action brought by Arthur C. Harper against the Chicago, Milwaukee & St. Paul Railway Company to recover damages for a personal injury alleged to have

Facts. been caused by the negligence of the defendant's servants. In regard to the facts of this case there is but little conflict, as appears from the evidence of the respective parties. The railway company, under an ordinance of the city of Chicago, was authorized to construct, maintain, and operate its tracks on North Branch street, on Goose island. The street crosses the island east and west. There are no improvements on the street, except the Chicago & Pacific elevator on the south side of the street, and a few other buildings used for warehouse purposes. The tracks of the railway company are located on the north side of the street, and there is a plank driveway south of the tracks. On the 16th day of August, 1885, the section hands of the railway company, under charge of a foreman, were repairing the rails of the tracks located on the street. They were at work nearly north of a new elevator, which was in process of construction. The plaintiff was employed as a watchman by the contractor of the new elevator. It appeared that the ends of the rails had become battered, and the section hands were engaged in removing the rails and cutting off the battered ends with a cold-chisel, and then replacing them. While the section hands were engaged in the performance of this service, the plaintiff, while crossing the street from the elevator to the opposite side, or while standing near where the men were at work, watching the men engaged in cutting off the end of a rail, was struck in the eye by a small piece of iron or steel from the rail, or the hammer used in cutting the rail, which resulted in the loss of an eye. In the declaration negligence is charged, as follows: "That the plaintiff, on August 16, A.D. 1885, in the city of Chicago and county of Cook, upon a certain public street there, to wit: a certain public street known as North Branch street, in the city and county aforesaid, and the said defendant, the Chicago, Milwaukee & St. Paul R. Co., was then and there possessed of a certain railway laid in and along a certain public street, which said railway was then and there under the care and management of divers persons, then the servants of the defendants, the said Chicago, Milwaukee & St. Paul R. Co., who were then and there engaged by and under the direction of the said defendants in chiseling and cutting pieces off from an iron rail on said railway; and while the plaintiff, with all due care and diligence, was then and there so walking along said public street, the defendant, the said Chicago, Milwaukee & St. Paul R. Co., then and there, by its said servants, carelessly, improperly, and in utter disregard of and for the safety of the said plaintiff, chiseled and cut off large and sharp chips of iron from said railway, causing said iron chips to

be thrown with great force in all directions; and by and through such negligence and improper conduct the defendant company, by its said servants in that behalf, and said defendant company, by its servants, cut off a large, sharp piece of iron, and caused it to fly and strike the said plaintiff with great force and violence in the face and eye," etc.

It is apparent from the evidence that the railway company had the right to occupy North Branch street with its tracks, and it is also clear that it had the right to make all needed repairs upon its tracks; and the real question presented is whether the repairing was done by those in the employment of the railway company in a negligent manner, and whether the injury received by the plaintiff was caused by such negligence. As has been seen, it was charged in the declaration that the railway company chiseled and cut off large and sharp chips of iron from said railway, causing said iron chips to be thrown with great force in all directions; that through such negligence defendant cut off a sharp piece of iron, and caused it to fly and strike the plaintiff with great force in the face and eye. Under this averment in the declaration the court, on its own motion, instructed the jury as follows: (1) If the jury believe from the evidence that at the time of the accident the plaintiff was upon a public street and was exercising reasonable care for his personal safety, and if the jury further believe from the evidence that the defendant's servants were then and there in the public street cutting an iron rail with a cold-chisel, and were doing this in a manner so as to throw pieces or chips of iron through the air with great velocity over and upon such street or highway, so as to endanger the safety of persons going or being on said street; and if the jury further believe from the evidence that this was negligence, and that the plaintiff was injured as the result of such negligence, then the jury will find the defendant guilty, and assess the plaintiff's damages at such a sum as they believe, from the evidence, he has sustained as the result of such injury, taking into consideration the nature of the injury, the pain and suffering he endured, the loss of time, and the expense of being cured, in so far as these things are shown by the evidence.

If the evidence introduced on the trial had established the negligence averred in the declaration, or even tended fairly to establish the averment, the instruction might have been proper; but such was not the case. On the other hand, the evidence shows that the repairs were done in the ordinary and usual manner adopted by railroad companies. The second witness called by the plaintiff testified that "During the thirteen years that I have been track foreman, it has been the usual custom of roads in re-

**Negligence
in cutting
rail.**

**Instruction
not war-
ranted by
evidence.**

pairing their rails to pursue the same course—do the same as we did—then cut off the ends, and shorten the rails.” Nor is there any evidence in the record that the act of cutting off the end of a battered rail with a cold-chisel in the manner adopted by the railway company would result in throwing pieces or chips of iron through the air with great velocity, as intimated in the instruction. There was therefore no evidence before the jury to authorize the giving of the instruction, and it is a familiar rule that an instruction must be predicated upon the evidence introduced on the trial; and an instruction with no evidence to support it is erroneous. It is true that a small piece of steel or iron was detached from the rail or hammer, and was thrown through the air and struck the plaintiff; but there is no evidence that other chips of iron were cut off and passed through the air while the railway company was repairing its rails, and the instruction as it was prepared was calculated to mislead the jury. If the plaintiff desired to predicate an instruction on the negligence charged in the declaration, such negligence should have been established by the evidence, or at least the evidence should have tended to establish such negligence.

The judgment of the appellate court will be reversed, and the cause remanded to the circuit court.

BAILEY, J., having heard this case in the appellate court, took no part in this decision.

HOWARD

v.

KANSAS CITY, FORT SCOTT AND GULF R. CO.

(*Kansas Supreme Court, April 5, 1889.*)

Crossings—Contributory Negligence—Direction of Trainman.—Plaintiff and her husband, who were about 60 years of age, were passing along the principal street of La Cygne, which is crossed by a railroad track. Upon reaching the crossing, they found the street blocked by a train of freight cars. Plaintiff's husband went to the north end of the train in search of a safe crossing, but finding a number of cars standing on the siding, returned to the crossing, and waited for the opening or departure of the train 15 minutes, when one of the trainmen, of whom plaintiff enquired how long the train would remain there, replied, “A good while,” and suggested to them to climb over the train. Instead of going around the train, or waiting for its departure, they acted upon this suggestion, and climbed over a coal car in the train, and the plaintiff, in jumping or getting down on the opposite side of the train, struck her foot against a tie of the track, which was in proper position, and broke one of the bones of her leg. *Held*, in an action against

the railroad company to recover for the injury, that her attempt to climb over the train under the circumstances amounted in law to contributory negligence, and the direction of the trainman to cross over the train did not justify her in encountering so obvious and great a danger.

ERROR to District Court, Linn County.

Action by Harriet A. Howard against the Kansas City, Fort Scott & Gulf Railroad Company, to recover damages for personal injury sustained by her, as she alleges, in consequence of the negligence of the railroad company. In her petition she alleges: "Said plaintiff, for cause of action against said defendant, says that said defendant is a railroad corporation, duly incorporated and organized under the laws of the State of Kansas, and was at the happening of the hereinafter events operating the line of its railroad in and through Linn county, Kan.; that said plaintiff was at the happening of the hereinafter events an old lady, married to one Charles A. Howard, and residing at La Cygne, in Linn county, Kan.; that on the evening of the 4th day of March said plaintiff, with her husband, was visiting at the house of a friend in said La Cygne, on the west side of the line of the defendant's track where it passes through the said town of La Cygne; that after completing their visit at the said house of their said friend the said plaintiff, with her husband, started for their own residence in said town, which was situated on the east side of said track, and that said plaintiff and her husband in going home passed east on Market street in said town; that at said time Market street was the usual and most direct route of travel from their said friend's residence, where they had been visiting, to their said home; that Market street crosses said railroad track immediately south of the railroad depot platform of said defendant in said town, and is the principal crossing of said railroad track in said town; that at said time said walks were constructed along said Market street across said railroad track, and east and west of said track; and that no other street leading across said track had sidewalks leading to or across said track. Plaintiff further says that when said plaintiff and her husband came up to the crossing of said railroad at said Market street, on their way home, a long train of cars was standing on said track, blocking up and unlawfully obstructing said crossing, and extending north and south of said crossing a great distance, and thereby preventing the passing and repassing of persons and vehicles on said Market street across said railroad; that in said train at said crossing were some coal cars, and that the north end of one of said coal cars was opposite the south end of the depot platform, and a little north of the railroad crossing; that plaintiff and her husband desired to cross said railroad at said crossing at that time, and walked up and on the platform at its south end, remaining there a few moments, expecting the train to pull out or make an

opening at said crossing. After remaining there some time Charles A. Howard went north on the platform, and to the north end of the train, and around the caboose, for the purpose of finding a safe way to cross said railroad track, but found on the switch of said railroad, on the east side of said caboose, a large number of cars standing, and returned to the south end of said platform to said plaintiff; that plaintiff and her husband then remained upon said platform at its south end for a period of at least fifteen minutes, waiting for said train to pull out or make an opening of the same at said crossing, and while standing there the conductor or brakeman of said train, being an employe of said defendant, came along on said platform with a lantern, and asked this plaintiff and her husband if they desired to cross said railroad, and being informed that they did, he directed this plaintiff and her husband to cross said train and said track at the north end of said coal car of said train; plaintiff enquired of said employe how long said train would remain there, and said employe answered, 'A good while,' and directed said plaintiff and her husband to cross said train at the north end of said coal cars; that plaintiff and her husband, in obedience to said direction, crossed said train at the north end of said coal cars, but, in crossing, this plaintiff, although exercising due care and caution in getting down from the east side of the north end of said car, struck her foot against the end of the tie of the track of said defendant, and broke one of the bones of her leg, and greatly injured and mutilated her limb, and otherwise jolted and injured said plaintiff; that thereafter it was with great difficulty and with much pain that said plaintiff was removed to her home in said town of La Cygne: that she immediately employed skilled physicians to operate, dress, and doctor said leg, and her other injuries, and has continued ever since then under the care and skill of learned physicians; but that notwithstanding said treatment she has greatly suffered, and has been unable to perform any of her duties to her husband and family, but has been an invalid ever since, and is now an invalid, and is permanently disabled by reason of said injuries from performing her usual duties and labors, and is confined constantly to the house, being a great sufferer, and in pain almost constantly. She further says that she and her husband are each old people, about 60 years of age each, and have been married and lived together for a great many years; that by reason of the premises said plaintiff has been greatly injured, maimed, bruised, and hurt, and has suffered great pain; her general health has been impaired, and she has been permanently disabled; that she has paid for the services of physicians a large sum of money, and has been entirely disabled from performing her usual duties,—to her damage in the sum of five thousand dollars. Wherefore, plaintiff demands judgment for the sum of five thousand dollars, and costs." The de-

defendant demurred to the petition, alleging that it did not state facts sufficient to constitute a cause of action in favor of the plaintiff and against the defendant. This demurrer was heard on July 28, 1886, and was sustained, and the court gave judgment to defendant for costs. An exception was taken by the plaintiff, and she brought the case here for review.

W. R. Biddle for plaintiff in error.

Blair & Perry and *Wallace Pratt* for defendant in error.

JOHNSTON, J.—The plaintiff was injured while climbing over one of defendant's railroad trains at La Cygne, Kan., and seeks to recover \$5,000 from defendant as compensation for the injury suffered. The train was standing at the depot, and across the principal street of La Cygne, along which **Facts.** the plaintiff, a woman about 60 years of age, and her husband were passing. There was no opening of the train at the crossing, and when the plaintiff and her husband reached the depot, and found the street obstructed, they waited a few moments for the opening or removal of the train, which did not occur; and then the husband went to the north end of the train, seeking a safe crossing, but, finding a large number of cars standing on the sidewalk or switch, returned to the depot, where they remained 15 minutes more, waiting for the opening of the train or clearing of the street. While standing there the conductor or a brakeman approached, and the plaintiff enquired of him how long the train would remain there, who answered, "A good while," and directed them to cross the train by going over the top of a coal car near which they were standing. Acting upon this suggestion, she climbed over the car or train, and in jumping or getting down on the opposite side she struck her foot against a tie of the track, breaking one of the bones of her leg, and causing the injury of which she complains.

These are the principal facts stated in the petition, and upon these we are constrained to hold with the district court that the plaintiff was not entitled to recover. It is very doubtful whether there was any negligence of the company that can be said to have directly or proximately contributed to her injury. While the stopping of the train blocked the street for a time, and while one of the employes of the defendant is said to have suggested to her to climb over the car, still the train was not moved after she undertook the perilous climb, and the injury resulted from jumping or stepping on a tie in the track that is not alleged to have been out of place or in deceptive or dangerous position. The misstep of the plaintiff appears to have been the direct cause of the injury. There were no pitfalls or dangers not to be anticipated on the car where she crossed or on the ground where she alighted.

Plaintiff not entitled to recover.

But if it is granted that the obstruction was unlawful, and that the action of the company contributed to cause the injury, still the conduct of the plaintiff was such as to preclude a recovery. It is a general rule that if the plaintiff, by the exercise of ordinary care, might have avoided the consequences of the defendant's neglect, he cannot recover, except, perhaps in case of wanton and wilful injury. *Kansas Pac. R. Co. v. Pointer*, 14 Kan. 38. It was settled in the case of *Kansas Pac. R. Co. v. Peavey*, 29 Kan. 180; *Am. & Eng. R. R. Cas.* 260, that the doctrine of contributory negligence does not obtain in this State. It was there said: "Where two parties, of each of whom the exercise of ordinary care is required, are guilty of negligence contributing to the injury of one of them, the injured party cannot recover damages therefor from the other on the sole ground that his negligence was less than that of the other, and generally the mere fact that the plaintiff has been guilty of less negligence than the defendant will not authorize a recovery on his part. . . . Therefore, if the plaintiff below himself was guilty of ordinary negligence contributing to the injury, he cannot recover, if the negligence of the railway company or its engineer was merely greater than his; for the plaintiff below must have exercised ordinary care, and not have been guilty of ordinary negligence."

The act of the plaintiff in climbing over a train of cars liable to to be moved at any time, not only shows a want of ordinary care, but it was a glaring case of rashness and recklessness.

Contributory negligence—Climbing over cars at crossing. It would have been an exceedingly perilous venture for a person young and alert to have made in the day-time, but for a woman 60 years of age to attempt it in the night-time was exceedingly reckless. She was not driven by any real or apparent danger to encounter the hazard or assume so great and obvious a risk. Ordinary prudence should have suggested the crossing of the track on another street, or going around the train, or, if that was impracticable, to have waited for the departure of the train or the opening of the street. True, it is alleged that her husband went to the north end of the train in search of a safe crossing, and found a large number of cars standing on the siding; but it is not stated or claimed that these blocked the passage in that way, nor was there any attempt on their part to go around the south end of the train. The unreasonable and unlawful obstruction of the street might make the company liable to the plaintiff for the damage sustained from such delay and obstruction. But it surely furnished no reason or excuse for the great peril which the plaintiff knowingly incurred. *Lewis v. Baltimore etc. R. Co.*, 38 Md. 588, was an action to recover damages for an injury inflicted in about the same manner as the injury in this case was occasioned. A train of freight cars was left standing across a street of a city, blocking

the crossing. A person came along the street and found the crossing blocked by the cars. Instead of waiting until the train had moved, or going around the train, he attempted, in the dark, to climb over the platform of a car, and thus cross to the opposite side of the street. While in the act of pulling himself up by the handle attached to the car, with one foot on the platform and the other hanging down, the train suddenly moved, and his leg was caught and crushed between the two cars. In an action by the injured party it was held that the attempt of the plaintiff to climb over the train under the circumstances was such a glaring act of carelessness as to amount in law to contributory negligence. In 2 Ror. R. R. (page 1130) it is said that, "It is such gross negligence and want of care and so reckless an act for a person to attempt to pass under the cars, though standing still at the time of the inception of the effort, that if an injury is received in the attempt a recovery cannot be had against the company for the same, even if the cars be suddenly started without giving the usual signal for starting, and thereby cause the injury." See also *Memphis & Charleston R. Co. v. Copeland*, 61 Ala. 376; *Stillson v. Hannibal & St. J. R. Co.*, 67 Mo. 671; *O'Mara v. Canal Co.* 18 Hun 192; *Central R. etc. Co. v. Dixon*, 42 Ga. 327; *Union Pac. R. Co. v. Adams*, 33 Kan. 427; 19 Am. & Eng. R. R. Cas. 376; *Chicago, R. I. & P. R. Co. v. Houston*, 95 U. S. 697. Being an adult, the plaintiff must be presumed to be endowed with sufficient sense to appreciate the risk which she was incurring, and to exercise ordinary prudence. The fact that the conductor or brakeman directed her to climb over the train will not justify her in encountering a known danger of so perilous a character. It may be doubted whether it is within the scope of employment of these employes to direct persons travelling along a street, not connected with the train or the service of the company; but, whatever may be the rule, the direction of the employe is no excuse for the rash act, where the danger was so obvious to the plaintiff. "Even, in the case of passengers, obedience to the directions of the conductor will nor avail the passenger, if the danger of obedience is plainly apparent. In that class of cases, as is well known, the passenger has much greater claims to protection than a traveller along a highway, and yet the overwhelming weight of authority is that the passenger cannot rely upon the conductor's directions, where they would lead him into danger plainly open to observation." *Lake Shore & M. S. R. Co. v. Pinchin*, 112 Ind. 592; 31 Am. & Eng. R. R. Cas. 428. If the plaintiff had been a child of tender years, or a person not endowed with sufficient sense to appreciate the risk, or if in crossing she had encountered dangers known to the employe giving the direction, but not apparent to her, other considerations would arise. She, however, had reached years of maturity and discretion, the peril encountered was palpable, and as apparent to

her as to any one else. She voluntarily and knowingly exposed herself to a threatening danger, and assumed a risk such as no person of ordinary prudence should assume. The injury would not have occurred except for her reckless act in climbing over the train; and, taking the facts and circumstances as stated in her petition, it must be held as a matter of law that the injury resulted from her careless and reckless action, and that it is so clear a case of contributory negligence as will preclude a recovery.

The judgment of the district court will be affirmed. All the justices concurring.

BROWN AND WIFE

v.

EASTERN AND MIDLANDS RAILWAY COMPANY.

(*L. R. 22, Q. B. Div. 391.*)

Highway—Nuisance—Frightening Horses—Evidence.—In an action for a nuisance it appeared that the plaintiff was driving at night in a cart drawn by a horse along a public highway, when the horse shied at a heap of dirt and refuse placed by the defendants on their land adjoining the highway, and the cart was upset and the plaintiff injured. Evidence was tendered by the plaintiff to prove that other horses had shied at the heap on the same day. *Held*, that if the heap was of such a nature as to be dangerous by causing horses passing on the highway to shy, it was a public nuisance, and that the evidence showed that the heap was likely to cause horses to shy, and was therefore admissible.

ACTION for negligence.

The pleadings, facts and arguments sufficiently appear in the judgment of the court.

Philbrick, Q. C. and *Poyser* for the plaintiffs.

Kemp, Q. C. and *Haigh* for the defendants.

Cur. adv. vult.

The judgment of the court (DENMAN and STEPHEN, JJ.) was read by

STEPHEN, J.—This was a motion to set aside judgment of non-suit, and to enter judgment for the plaintiffs for 150*l.* in an action tried at Norwich in July, 1888, before Pollock, B. The statement of claim stated that the defendants negligently placed a heap of earth scrapings and refuse in a public highway so as to obstruct it, whereby Mrs. Brown, one of the plaintiffs, who was driving along the highway, was thrown from her cart and injured, the damages being agreed at 150*l.*, her horse having shied at the heap.

**Statement
of case.**

The statement of defence denied that the defendants placed

the heap on the road, or suffered it to remain there, and that, in any event, they placed it so as to be an obstruction, and did not admit that the horse shied at it.

The reply stated that if the heap was not on the road, it was placed upon land of the defendant's immediately adjoining the road, and allowed to remain so as to be a public nuisance to persons using the road, and upon this issue was joined.

It appeared on the trial that the place where the accident happened was a triangular piece of ground, acquired by the railway under parliamentary powers for the purpose of diverting a road, and surrounded by three roads, namely, the two branches of the old road and a short branch which connected them. The heap of refuse consisted of a cart load of road scrapings, collected by the servants of the company from these roads and deposited by them on the triangular piece of land inclosed by the roads, and two or three yards from the road.¹ There was evidence that the public drove over the three-cornered piece of ground.

At the end of the plaintiffs' case the judge nonsuited the plaintiffs, and in the course of the trial he excluded evidence to show that after the placing of the heap on the ground (which was on the morning of the day when the accident happened at about 6:30 P. M.) several horses passing the place shied at the heap.

It was contended before us that the nonsuit was right, that the land being the defendants they had a right to place the heap on it, and that if it frightened horses passing by they were not responsible; also that the fact that other horses shied at the heap was not admissible as evidence that the plaintiff's horse shied at it.

Two questions then occur. 1. Assuming that the horse shied because the heap was placed on the defendants' land, was the plaintiff entitled to recover? 2. Was the fact that other horses shied at the same place on the same day admissible evidence that the plaintiffs' horse shied at the heap?

These two questions appear to us to admit of the following short answers.

If a person erects on his own land anything whatever calculated to interfere with the convenient use of the road, he commits a nuisance. Every railway which, without express parliamentary sanction, ran by the side of a highway so as to frighten horses, etc., would be a nuisance but for the parliamentary authority under which it was made. So if a man kept a ferocious and noisy dog so near a highway as to be likely to frighten horses on it by his barking. If, therefore, this heap was of such a nature as to be

(1) The horse shied at the heap and went across the road, and the cart was upset at the side of the road, whereby the plaintiff was injured.

likely to cause common horses to shy it was a public nuisance. Whatever, therefore, showed it to be likely to cause horses to shy was evidence for the plaintiffs. It was proposed to show by the plaintiffs that as soon as it was erected, and till within a short time before their own horse shied, various horses passing by shied at the same place. Several instances were given by Mr. Philbrick from the reports in which such evidence had been admitted, and we think it was rightly admitted. It is perfectly true that evidence of events similar to the one under enquiry on account of their general similarity, is not admissible. You must not prove, e.g., that a particular engine driver is a careless man in order to prove that a particular accident was caused by his negligence on a particular occasion; nor that a person accused of crime is an habitual criminal; but when the question is whether a particular act is a public nuisance, it is difficult to see how it can be proved to be so except by showing cases in which it has interfered with a public right. If a trade is alleged to be noxious by producing unwholesome smells it may surely be proved that such a smell is frequently perceived, and that it has an injurious effect on those who perceive it.

We think that the judgment of nonsuit should be set aside, and that the case should go for a new trial.

Rule absolute.

The defendants appealed.

Haigh (Kemp, Q. C., with him) for the defendants.

Poyser (Philbrick, Q. C., with him) for the plaintiffs.

The Court of Appeals (Lord ESHER, M. R., BOWEN and FRY, L. JJ.) were clearly of opinion that the evidence was admissible, and affirmed the decision of the Queen's Bench Division.

Appeal dismissed.

BROOKS

v.

LINCOLN ST. RY. CO.

(22 Neb. 644.)

Street Railway—Traveller—Contributory Negligence.—It is not negligence *per se* to travel along a public highway by the side of a street railway track on which a car is moving in the same direction as the party travelling, unless such

party places himself in such position as to be run over or injured by such street car.

Same—Duty of Driver—Watchfulness.—The driver of a horse car on a street railway, in driving horses attached to such car, must sit or stand on the front platform or place provided for him, must maintain control of the horses, and exercise a reasonable degree of care and watchfulness to prevent collisions and injury to persons crossing or travelling on or over such street.

ERROR to District Court, Lancaster County.

Action by Archie Brooks, by his next friend, against the Lincoln Street Railway Company, to recover damages for personal injuries sustained through the alleged negligence of defendant. Plaintiff brings error to review a judgment for the plaintiff.

J. L. Caldwell for plaintiff in error.

E. P. Holmes for defendant in error.

MAXWELL, J.—This is an action to recover damages sustained by the plaintiff through the alleged negligence of the defendant. The plaintiff alleges in his petition "that plaintiff is an infant under twenty-one years of age, and that this action is brought by his next friend, Elizabeth Brooks, for his benefit; that the defendant, on February 19, 1886, was a corporation duly organized under the laws of this State, and the owner of a street railroad line with its cars running thereon, and which cars were drawn by horses on and through O street, from Tenth street to Twenty-seventh street, in the city of Lincoln, Lancaster county, Nebraska; and that on said nineteenth day of February the said plaintiff was travelling on horseback east along said O street, the same being a public highway, open and free to all persons to pass and repass at their own free will and pleasure; that about nine o'clock on the evening of said nineteenth of February, while plaintiff was thus travelling on said O street, he overtook one of defendant's cars, which was then drawn by horses, and in charge of one James Kelley, an agent and servant of defendant; that said car was moving so slowly that the horse on which plaintiff was riding walked by and passed defendant's car and horses, and when but a few feet in front of the team attached to said car, plaintiff's horse stumbled and fell, and plaintiff was thrown to the ground between the tracks or rails of defendant's car line, immediately in front of defendant's horses, without any fault or negligence on his part; that plaintiff uttered a loud outcry and attempted to get up, but was struck by defendant's car and caught by the brakes, machinery and projections thereof, and was rolled, crushed, and dragged under said car about forty or fifty yards, and was stripped of his clothing, and was run upon and over by defendant's car, bruising and wounding plaintiff's legs, arms, body, and face, and rendering him sick, sore, and lame, and causing him to suffer severe bodily pain and anguish, and leaving him unable to pursue his ordinary work as

telegraph operator and lineman, or any work whatever, so that he has been and will be obliged to expend large sums of money, to wit, two hundred dollars, for medical aid, medicines, nursing, and care to be relieved of the consequent pain and suffering; that said accident and injuries were caused wholly and solely by the culpable and inexcusable negligence of the defendant, its agents and servants, in not attempting to stop said car, or direct or stop the horses attached to the same, or apply the brakes to said car, and in absolutely refusing and neglecting to do any act whatever to avoid or lessen said accident and injuries; that no act on the part of the plaintiff contributed in any degree to produce or cause the said accident and injuries, but the same were caused entirely and only by the negligence of defendant, its agents and servants."

The defendant, in its answer, in substance denies that the accident happened through fault, negligence, or carelessness on its

Facts shown part, but solely from the recklessness and carelessness of the plaintiff. The testimony tends to show that the
by evidence. plaintiff was a telegraph operator, the office being at the corner of O and Tenth streets, in the city of Lin-

coln; that he resided with his mother at the corner of Twenty-fourth and Q streets in said city; that a little before 9 o'clock at night on the nineteenth of February, 1886, he left the telegraph office to go home; that he had a pony which he was accustomed to ride to and from his home, and on the night in question he rode east along O street on the north side of the street railway track; that the street was somewhat rough, and the principal travel of teams and wagons passing along said street was on the north side of the track, and some three or four feet from the same; the plaintiff, in riding along said street, was on the south side of the usually travelled track, and about three or four feet north of the street railway. At about the corner of Twenty-Third and O streets the plaintiff overtook the street car going east. He testifies: "I rode by the car, my pony was walking, and the street car horses were walking very slow,—hardly moving, it looked like to me,—and when I had passed them, I guess, about ten feet, my horse stepped into a hole apparently, and fell south, throwing me onto the track,—over onto the street car track,—and it seemed to me the horse was not in any hurry getting up, and held me there until the street car horses was on each side of me, and I couldn't get out, and the car passed over me and mangled me up under the car, and I caught under the car and dragged, I guess, for fifty or a hundred feet, on the hard frozen ground, in the middle of the track, and somebody picked me up and took me home or put me in the car." This testimony is not denied, except as to the distance the plaintiff was dragged.

The testimony of Kelley, the driver, as to the accident is as follows: "Where were you when you first saw Brooks on the

track?" "I was on the front platform, outside the door. I can tell how the whole thing was, if I can go on word by word." "Go on word by word, and tell how the whole thing was." "No. seven passed me on the switch, and after he got by me, I wanted to tell him not to make another trip, but for to go to the barn,—that I had made his trip; for my trip was an extra trip. I leaned around the car,—stuck my head around the car after he got past me quite a ways, and I whistled to make him stop; I forgot to tell him when he passed me; and, while leaning around there whistling and trying to make him stop, I saw a horse and man coming towards me,—coming from the west. When I whistled, I thought I heard this man that was on horseback whistle and try to make him stop. When I saw that I couldn't make him stop, I tied my lines to the front dash. I stepped in the car, closed the door, and fixed a poultice that was on my neck,—pulled it up and fixed it; it was on a boil on my neck. I saw the old lady that was on the car look out, when it attracted my attention, and I looked out and saw a man going by on horseback. I stepped out on the front platform, turned my back to the north, picked my lines up off the dash, straightened up. Just then I saw this man's pony slip,—his pony fell about half way,—just stepped to the side and caught itself, and throwed him into the center of the track. That scared my horses, and they stopped stone still. Before I could catch the brake, the car run upon the horses and scared them, and they gave a lunge, and before I could catch the brake, the car run upon the horses. There was mud and dirt on the brake-shoes. When I had my brake set, and throwed all my force on it, the mare on the left side kicked, and I had to let the brake go. When I got the brake and set it, the car was then sliding from the force the horses gave it; it was then in pretty good motion. The mare kicked again, and kicked the dash when the car passed over him. I stopped the car as soon as I could. I got off the car to where he was laying in the middle of the track; he wasn't laying, he was on his hands and knees. I asked him what was the matter, and he says, 'For God's sake, Kelley, take me to mother's.' I asked him where his home was, and he pointed up northeast from where he was, and says 'Up there.' By this time Mr. Barrett, the old man that was in the car, and that man that run the second-hand store, and a man that lives right across the street, I think, in a little red house, they were there; they helped me put him on the car and I drove the car up onto the Antelope bridge." The witness then testifies that he carried the plaintiff to the home of his mother. On cross-examination he said: "I think his mother was the first that came to the door, and she says—'I think these are the words she repeated,—'Oh, my God, is the boy killed?' I did not know how bad the boy was hurt. I said to some one there that was coming to tell her, 'Don't you tell her.'

She asked me what was the matter with the boy, or how did he get hurt, and I told her that I did not know. I did not want to tell her the truth, because she was so badly excited then." "Did you have any further conversation with her on that night?" "Yes, sir." "State what it was." "I carried the boy in and put him on the lounge, and went down to my car,—I left the car just on the other side of the Antelope,—put up my lines, put on the brakes, and I went up to see how the boy was. His mother was there, and his brother, Charlie Brooks. His mother says to me, 'It is all your fault.' I told her that I could not help it. Charlie Brooks says to me, 'If you had have pulled up the lines, stopped the car, it would never have happened.' 'Well,' I says, 'that is all right, Charlie; stopping a car is a great deal different than stopping a wagon; you can stop a wagon by pulling up the lines, but you can't stop a street car that way.' I left the house, went down to the car, drove up to the barn on Tenth and A." "Did you not, on February 19, 1886, at Mrs. Brooks' house, in this city, in the presence of Maggie Brooks, Charlie Brooks, Oscar Chase, and a man named Clussman, say in reply to Mrs. Brooks, 'Do you think I did it on purpose? If I had been out by the brake, it would not have happened; I was inside talking to a man, and did not know it;' or in substance, words like these?" "No, I did not." "State if there is any other thing or fact in relation to this accident that you have not fully explained." "This is all I remember."

An effort was made on behalf of the railway company to have the testimony of Kelley as to his admissions to Chase and others stricken out and excluded, which was overruled. The plaintiff called O. J. Chase, who testified that Kelley, on the night of the injury, said when interrogated as to the cause of the accident: "I was in the car. If I had been outside I could have warded this accident off." In this testimony, Chase is corroborated by the mother of the plaintiff and a brother and sister.

One John H. Barrett was called as a witness by the railway company, who testified in regard to the accident as follows: "After we passed the switch the horses slackened up, and the driver just stepped inside of the car, and said he had a sore or something troubling him on his neck, and he unfolded a muffler and twisted it about his neck. I noticed he bent forward considerably, and he stood there at the door. All at once he sprang out from the door onto the platform, jumped at the brakes, and almost at that moment there was a jostling, and I jumped up and stepped out, and he stepped off and ran around, and I followed him around. I supposed he was off the track. As I followed him around, I saw a man lying on the track a little distance back, and I ran to him, and he was groaning badly, and said his legs were both broken; and within a moment or two, the driver took hold around his chest, and I took hold of his legs, and we took him in

the car and laid him out on the seat." There is other testimony in the record to which it is unnecessary to refer.

On the trial of the cause, the court instructed the jury as follows: "You are instructed that if the injury complained of was occasioned by the negligence of plaintiff in riding upon or along the side of the railroad track of the defendant, when said horse car of defendant was in motion, and that plaintiff, being thrown upon said track without fault of defendant, was run over unavoidably by defendant, and without fault of defendant and its servants in charge and control of said horse car, then your verdict should be in favor of the defendant; for, if the plaintiff contributed to the accident by carelessness or negligence, and was unavoidably injured by defendant and its servants in the ordinary course of defendant's business in running and operating said horse car, then, in such case, he could not recover against the defendant." This was excepted to, and the giving of the same is now assigned for error. It is not negligence *per se* to travel along a public highway by the side of a street railway track on which a car is moving in the same direction as the party travelling, unless such party places himself in such position as to be run over or injured by such street car. The jury were left to infer, however, by the instruction given that if the injury was occasioned by the plaintiff riding along the railroad track when the car was in motion, he could not recover. The question of negligence was one fact for the jury to determine from the testimony, and the effect of the instruction was practically to withdraw that question from the jury. The court therefore erred in giving the same.

The plaintiff asked the court to give the following instruction: "The court further instructs the jury that it was the duty and incumbent upon the driver of the defendant's car to stand on the front platform, with the lines from the horses drawing the car in his hands, and to exercise a reasonable degree of care and watchfulness to prevent all collisions and injury to persons crossing and travelling on and over said street. And if you believe from the evidence that the injury in this case was caused by the want of the driver remaining on the front platform, ceasing to have and hold the lines in a careful manner, his failure to watch carefully, or in any manner use reasonable care to prevent the injury, and that for any of said reasons the injury occurred, then the defendants are liable, and you will find for the plaintiff, and assess the damage at such sum as from all the evidence you believe he has sustained, unless you further find from the evidence plaintiff might, by the exercise of ordinary care, have avoided the consequences of defendant's negligence," which the court refused, to which the plaintiff excepted. This instruction should have been given. It is the duty of the driver of a

**Duty of
street car
driver to
avoid col-
lision with
persons on
street.**

street car to sit or stand on the front platform, or such place as may be provided for him, with the lines of the horses drawing the car in his hands, and to exercise a reasonable degree of care and watchfulness to prevent collisions or injury to persons travelling on said street. A street is a public thoroughfare where all may pass and repass at pleasure, each having due respect for the rights and safety of others. There is testimony from which the jury would have been warranted in finding that the driver was not at his post of duty when the accident occurred; that he was inside of the car, and, upon observing the accident, rushed out and endeavored to stop the car, when, had he been at his post, he could have done so before the car passed over the plaintiff. While a street railway company has a right to operate its lines of railway in the streets of a city, and to precedence over other vehicles on its right of way, yet these rights must be exercised with due regard to the rights of others, and not in such a manner as wantonly or negligently to cause injury to persons lawfully crossing or traveling on said street.

The judgment of the court below having been for the defendant, it follows that such judgment must be reversed, and the cause remanded for further proceedings.

The other judges concur.

McWHORTER *et al.*

v.

PENSACOLA AND ATLANTIC R. CO.

(*Florida Supreme Court, November 21, 1888.*)

Railroad Commission—Suit Against State.—The rule which forbids suit against officers of a State, because, in effect, a suit against the State, seems to apply only where the interest of the State is through some contract or some property right of hers, or where her interest is in a suit in her own name, brought or threatened by her officers, to enforce some alleged claim of hers.

Same—Injunction—Action for Penalty.—Railroad commissioners being authorized by statute to make reasonable rules and regulations for all railroads in the State as to charges for transportation of passengers and freights, and to furnish each company with a schedule of charges made for its observance, and having fixed certain rates for one of the companies which it deems not reasonable and just, said company filed a bill against the commissioners to enjoin them from promulgating said rates, or any other rates substantially the same. *Held*, that this is not, in effect, a suit against the State; but the statute having prescribed a penalty for violation of the rates fixed, and authorized the commissioners to institute action in the name of the State to recover the penalty, in so far as the bill seeks to enjoin them from doing this, it is in effect a suit against the State.

Same—Discretion—Unjust Rates—Remedies.—Where the law invests an officer

with discretion in the performance of an act, the courts will not interfere with or control his action by injunction. If injustice is done by his action, some other remedy must be sought. The statute gives these commissioners discretion in making rates for railroads, and they are entitled to the benefit of this rule.

Same—Reasonable Rates—Jurisdiction of Court.—Whether rates made by the commissioners are reasonable and just or not, even if subject to judicial control, is not open to enquiry in a suit to enjoin their discretionary action.

Same—Constitutional Law—Legislative Powers—Delegation.—A statute conferring on a commission authority to regulate the charges on railroads for transportation of passengers and freights is not a delegation of legislative power forbidden by the constitution of this State.

APPEAL from Circuit Court, Santa Rosa County.

Action by the Pensacola & Atlantic Railroad Company against George G. McWhorter and others, as railroad commissioners, to restrain defendants from promulgating rates for transportation, and procuring or permitting the institution of suits for the violation of rates heretofore fixed. Defendants appeal from a decree overruling a demurrer to the complaint.

The Attorney General for appellants.

W. A. Blount for appellee.

MAXWELL, C. J.—Appellants are commissioners, under an act of the legislature of Florida of 1887, "to provide for the regulation of railroad freight and passenger tariffs in this State; to prevent unjust discrimination in the rates charged for transportation of passengers and freights, and to prohibit railroad companies, corporations, and lessees in this State from charging other than just and reasonable rates, and to punish the same, and prescribe a mode of procedure and rules of evidence in relation thereto, and to appoint commissioners, and to prescribe their powers and duties in relation to the same." They bring this case here for a reversal of the decree overruling their demurrer to the bill of the Pensacola & Atlantic Railroad Company against them, which also enjoins them from 'promulgating, as binding upon the complainant, the rates for transportation of freight and passengers heretofore prescribed by the defendants for the complainant, or other rates substantially the same as said rates, and from procuring or permitting the institution of any suits against the complainant for any alleged charges by the complainant in excess of the said rates heretofore fixed, or in excess of any other rates which may be fixed by the defendants for the complainants, substantially the same as the said rates.' Statement of case.

The *gravamen* of the bill is that the Pensacola & Atlantic Railroad Company is a corporation of the State of Florida empowered to construct and operate a railroad from some point on the Appalachian river to the city of Pensacola; that the road was completed and began to operate in April, 1883, and has been operated ever since; that the defendants were appointed commis-

sioners, under the act above mentioned ; that they have fixed rates for freight and passenger transportation on the railroads of the State, including that of complainant, which they have determined to be just and reasonable charges to be made by said railroads, and have ordered the several companies, including complainant, not to make any charge greater than the rates so fixed ; that they have fixed three cents per mile as the uniform rate to be charged by complainant for passengers, and have fixed rates for freight, varying with the distance of transportation, and with certain classification of the various kinds of freight, which they have arbitrarily adopted ; that the rates thus fixed were made in spite of facts hereinafter stated, and argument thereon before defendants ; and, as authorized by the act, complainant protested to defendants against the enforcement of said rates, but the defendants refused to change the same, and thereupon complainant appealed to the board of revisers provided by the act, but that board confirmed the action of defendants ; that complainant, for reasons hereinafter stated, declined to adopt the rates thus prescribed, and have charged for passengers and freight more than said rates, but the rates so charged were just and reasonable, and in no instance has it made a charge that was not just and reasonable, never having charged for passengers more than five cents per mile, the rate authorized by its charter ; that consequent upon such charges by complainant, which defendants allege to be in violation of the act and of their order, they demanded that complainant restore to the persons so charged the excess over the rates fixed by them, and upon complainant's refusal they have procured the attorney general of the State to bring several suits (naming them) to recover the penalties prescribed by the act for charges in excess of rates so fixed ; that numerous persons who have been charged by complainant more than the rates fixed by defendants, relying on the authority of defendants to fix rates, have brought suits against complainant to recover damages for said alleged excessive charges. that said suits of the State, and of the said persons, are now pending, and the defendants announce their intention to procure other suits to be brought by the attorney general for every case of a charge by complainant in excess of the rates fixed by them ; and that there are numerous cases of such excess, and complainant will continue to so charge until it be judicially determined that it has not the right to do so ; that defendants have not the power to determine the justice or reasonableness of complainant's charges, because that involves a judicial function which they are inhibited from exercising by the constitution of the State ; that if not judicial, it is legislative, and cannot be exercised by defendants ; that if defendants have any power whatever in the premises, it is restricted to fixing rates that are in fact just and reasonable, and they cannot require complainant to reduce its rates to charges

which are not reasonable and just to it; and that the rates prescribed by defendants are much less than those heretofore charged by complainant for the same services, and are neither just nor reasonable; for though its charges have been much greater than is allowed by the rates fixed by defendants, and have brought a much larger gross income than would be realized from said rates, yet complainant has not only failed to realize any interest upon its investment, but has failed to realize enough to meet the necessary expenses connected with the operation and ownership of its road. The bill then proceeds to give figures and statements as to the cost of construction and equipment of the road, and its actual value, and as to earnings and expenses of its operation, going to show excess of expenses over earnings, and actual loss from the operation of the road during the more than five years of such operation to date, and alleges facts in regard to the condition and business of the country through which the road runs to show that such loss, even on the basis of its charges, will probably continue for some years. It further alleges that the rates prescribed by defendants are also unreasonable and unjust when compared with those permitted by them to other roads in the State, giving figures to show the difference; and that a reduction of its charges to the rates prescribed by defendants would compel complainant to forego any possibility of earning any interest on its investment, or any income from the operation of its road, and that to continue the operation at an actual loss would render its road valueless; and that defendants cannot, under the law, so act as to produce this result, for thereby complainant would be deprived of its property without due process of law, contrary to provision of section 1, art. 14, Const. U. S. The prayer of the bill was for the relief which granted by the injunction.

On the argument of the demurrer to the bill the commissioners filed an affidavit, intended mainly to show that in their dealings with complainant they were not led to expect such complaints as the bill makes, and they say that if application had been made to them for a change or increase in the rates, and it had appeared to them reasonable and just, they doubtless would have made proper changes, as they did in cases of application by other roads.

The preliminary question raised by the demurrer arises on two of its grounds, the third and fourth, viz.: (3) That the court has no jurisdiction of the matter set forth in complainant's bill, or to grant relief in the premises; and (4) that this is in effect a suit against the State.

We will consider first whether this is, in effect, a suit against the State. If it is, it is well understood that it cannot be sustained, unless by consent of the State. The objection springs from the rule that a suit against officers of the State founded on any claim or complaint the adjudication of which against the offi-

cers would be, in effect, an adjudication against the State, is a suit against the State. In *Osborn v. Bank*, 9 Wheat. 738, and *Davis v.*

Suits look only to the record to determine whether the State
against was a party. But in subsequent cases this test is treated
officers as too narrow, and cases against officers were held to be
of State. cases against the State although not named on the record.

See *Louisiana v. Jumel*, 107 U. S. 711, 2 Supt. Ct. Rep. 128; *Cunningham v. Macon & B. R. Co.*, 109 U. S. 446; 14 Am. & Eng. R. R. Cas. 567; *Hagood v. Southern*, 117 U. S. 52, and *In re Ayers*, 123 U. S. 443. In the Virginia Coupon Cases, 114 U. S. 270-338, the State being interested, but the court holding she was not a necessary party, it was nevertheless said in its opinion "that the question whether a suit is within the 11th amendment is not always determined by reference to the nominal parties on the record." And conversely, in the cases of New Hampshire and New York *v. Louisiana*, 108 U. S. 76, the court refused to sustain a suit of one State against another, although the constitution of the United States authorizes such a suit; because it appeared that while on the record the States suing were the nominal parties, yet they were acting for some of their citizens, who were the real parties in interest, and who could not themselves sue the State, being within the prohibition of the eleventh amendment. It cannot be said, therefore, that the case under consideration is not a case against the State simply because the record does not bear her name, and indeed there has been no contention to that effect. So the question is whether the case comes within any class in which a suit against officers is of such a character that a judgment or decree cannot be given in it without affecting some right or interest of the State, so that the effective operation of the judgment or decree is really against the State, rather than the officers sued. In other words, would a decree against these commissioners be a decree against the State as the actual party?

The only cases in the supreme court of the United States in which it has been held that a suit against officers or others is a suit against the State are *Louisiana v. Jumel*, *Cunningham v. Macon & B. R. Co.*, *Hagood v. Southern*, and *In re Ayers*, all cited above. We need only analyze these so far as to show the nature of the question involved in each. The first, *Louisiana v. Jumel*, was an attempt of bond creditors of the State to protect and enforce their rights under the law of 1874, which provided for the issue of the bonds they held, and under an amendment to the constitution of the same year which ratified the law, as against an ordinance of the new constitution of 1879 which stopped the further levy of the tax that this law authorized for the purpose of raising revenue to pay interest on the bonds, and also prevented

Decisions
of United
States su-
preme court.

the disbursing officers from using funds in the treasury derived from previous levies for paying such interest. The suits were against officers of the State. It was not denied that this ordinance was unconstitutional because impairing the obligation of a contract of the State ; but the court held that the suits could not be sustained for the reason that the execution of her contract could not be enforced by a suit against her officers to which she was not a party. The case of *Cunningham v. Macon & B. R. Co.* was for the foreclosure of a mortgage to secure bonds issued by the company. Prior to its institution, the State of Georgia had gone into possession of the road, and was still in possession under purchase at a sale made on account of her lien to secure her endorsement of other bonds of the company. The court held that her interest in the property made her a necessary party, and it refused to entertain jurisdiction of the case, as she could not be sued without her consent. The case of *Hagood v. Southern* was a suit against officers of the State of South Carolina, on bond script issued by the State, which declared on its face that it was receivable "in payment of all taxes and dues to the State" to compel its receipt for taxes. This was held to be a suit that could not be maintained, because the State could not be compelled to perform her contract by a suit against her officers. The case of *In re Ayers* was on a writ of *habeas corpus*. A bill had been filed to enjoin officers of the State of Virginia from prosecuting suits in the name of the State against the tax-payers reported to be delinquent for the recovery of their taxes,—the *gravamen* of the bill being that they refused to receive coupons of the State for taxes, though made receivable by law, and that this was a violation of the contract of the State, but that under a subsequent law suits were threatened against those who tendered the coupons, and would not otherwise pay their taxes. An injunction was granted, which the officers disobeyed, and they were put into custody for contempt. The writ of *habeas corpus* was for their relief. The court discharged the parties, holding that though the suits threatened might be a breach of the contract of the State, yet the injunctions should not have been granted, because the actual party upon whom it operated was the State, and not the officers who were sued, and there being no jurisdiction against the State the injunction was void, and did not furnish legal ground for the imprisonment. The court refused jurisdiction of two of these suits, because they involved State contracts ; of the third, because it involved property of the State ; and of the fourth, because, although the foundation of the suit involved a contract of the State, the immediate proceeding was to relieve her officers from punishment for doing in her name that which, when done, would be her own act.

Looking to cases we find in the State courts, they are substan-

tially of the same nature. That of *State v. Burke*, 33 La. Ann. 498, was a suit presenting in part the same questions as those in *Louisiana v. Jumel*, and was decided adversely to the plaintiff, on the ground that if he had contract rights against the State they could not be enforced by a suit against her officers, she not being a party. In *Weston v. Dane*, 51 Me. 461; *Marshall v. Clark*, 22 Tex. 23, and *Houston etc. R. Co. v. Randolph*, 24 Tex. 317, similar decisions were given, the cases being against officers on pecuniary claims against the State; and similar decisions in *Printup v. Cherokee R. Co.* 45 Ga. 365, and *Hosner v. De Young*,¹ 764, being cases in which property claimed by the State was involved.

It appears, so far as we can find in the reported cases, that the rule which forbids a suit against officers, because in effect a suit against the State, applies only where the interest of the State is through some contract or some property right of hers, or where her interest is in a suit brought or threatened by her officers in her own name to enforce some alleged claim of hers. And it is important to observe the character of the interest. It is not enough that the State should have a mere interest in the vindication of her laws, or in their enforcement as affecting the public at large, or as they affect the rights of individuals or corporations, but it must be an interest of value to herself as a distinct entity,—of value in a material sense. She has an interest in the success of the policy of her laws, and in the just administration and execution of those laws, yet it is not an interest on which she can be said to be a party affected by any private suit arising under them, when it is not another and more direct interest inhering in some separate right or claim of right of her own.

With this distinction in mind, how stands the present case? The fifth section of the act constituting the office of the commissioners provides that they shall "make and fix reasonable and just rates of freights and passenger tariffs, to be observed by all railroad companies doing business in this State, on the railroads thereof; shall make reasonable and just rules and regulations to be observed by all railroad companies doing business in the State as to charges at any and all points for the necessary handling and delivering of freights; shall make such just and reasonable rules and regulations as may be necessary for preventing unjust discriminations in the transportation of freight and passengers on the railroads in this State; shall make reasonable and just rates of charges for use of railroad cars carrying any and all kinds of freight and passengers on said railroad, no matter by whom owned or carried; and shall make just and reasonable rules and regulations, to be observed by said railroad companies on said railroads, to prevent

**Decisions
of State
courts.**

**Statement
of rule.**

**Powers of
commis-
sioners.**

giving of any rebate or bonus, directly or indirectly, and from misleading or deceiving the public in any manner as to the real rates charged for freight and passengers." The sixth section authorizes and requires the commissioners to "make, for each of the railroad companies doing business in this State, as soon as practicable, a schedule of just and reasonable rates of charges for the transportation of passengers and freights and cars on each of said railroads, and said schedules shall, in [any suit] brought against any such railroad corporations wherein is involved the charges of any such railroad corporations for the transportation of any passengers, or freight, or cars, or unjust discrimination in relation thereto, be deemed and taken in all courts of this State as sufficient evidence that the rates fixed therein are just and reasonable rates of charges for the transportation of passengers and freights and cars upon the railroads, and said commissioners shall from time to time, and as often as circumstances may require, change and revise said schedules." There are other provisions in these sections which it is needless to recite.

The principal complaint of the bill against the commissioners is that, in performing the duty imposed on them, they exceeded the authority given by the act, and fixed rates for the road of the complainant that were not reasonable and just: that if said rates are enforced the road will be operated at a loss, to such extent as will render the property valueless; and that this amounts to a violation of the State constitution, which forbids the taking of private property without just compensation, and also of the constitution of the United States, in that it deprives complainant of its property without due process of law. There is here nothing that affects the State in any valuable interest of her own, or affects her otherwise than as she is concerned in having a law of a public nature carried out. Clearly, then, according to the test we think the law applies, the State bears no such relation to the subject-matter of this suit as renders her, in effect, a party to it, and if the injunction sought had been limited to staying the action of the commissioners in regard to rates only, the objection that she is a party would not obtain.

**Injunction
against rates
not suit
against
State.**

But the bill goes further, and founds a complaint against the commissioners in connection with section 17 of the act, which provides a penalty against any railroad company for violating the rules and regulations prescribed by them, and directs that they shall institute action through the attorney general to recover the penalty. Admitting violation of the rate regulations prescribed for it, the company, resting on alleged want of authority in the commissioners to fix for it the rates they did, prays that they be enjoined from instituting the action author-

**Injunction
against suit
in name of
State cannot
be main-
tained.**

ized. A further direction of the act is that the suit "shall be in the name of the State of Florida." It needs no argument to show that in such a suit the State is a party, and that the injunction asked against the commissioners to stay the suit would be an injunction in fact against her. It is precisely the case which led to *In re Ayers*, where officers were enjoined from bringing suits in the name of the State, which was held to be void because in fact an injunction against the State, the court saying, if "officers, attorneys and agents are personally subjected to the process of the court so as to forbid their acting in its behalf, how can it be said that the State itself is not subjected to the jurisdiction of the court as an actual and real defendant?"

There is a class of cases against officers in which suits are held to be allowable, although the officers were acting under orders or authority of the government. This is where they exceed their authority, and in their action commit a tort.

Suit against State officers for torts and to compel performance of duties. "In these cases [the officer] is not sued as or because he is the officer of the government, but as an individual." *Cunningham v. Macon & B. R. Co.*, *supra*. There is another large class of cases in which suits against officers of the State have been sustained, though it was to enforce obligations of the State, or to compel performance of some act authorized by law of the State in behalf of any one who may have had a substantial interest in its performance as an act on the part of the State. Thus, where a statute makes an appropriation of money out of the treasury of the State, for a certain defined purpose, and directs its payment by the proper officer, leaving in him no discretion to be exercised in regard to its payment, the party entitled may, on refusal of the officer to pay him, have a writ of *mandamus* against him to compel the payment, and the State need not be a party. High, Extr. Rem. §§ 101, 104. So, as to the performance by an executive officer of any ministerial act for the State not requiring the exercise of discretion. *Id.* §§ 107, 110, 127. This is sometimes treated in the discussion of cases as if connected with the non-liability of a State to be sued, and as an exception to the rule which forbids a suit against her through her officers; but we think this is not strictly correct, and that in this country, at least, in regard to executive officers, an entirely different question is involved,—to wit, the authority of one department of the government, as constituted here, to interfere with the functions appertaining to another,—and we treat the case before us in this view so far as it depends on the point raised by counsel growing out of this doctrine. The point referred to is that, while, in the class of cases just mentioned, a suit against an officer refusing to act will be sustained, on the ground that the law speaks to him as a ministerial officer, without discretion as to the thing directed to be done, on

the other hand, if the law invests him with discretion in doing it, the courts will refuse to interfere with that discretion. *Towle v. State*, 3 Fla. 202; High, Extr. Rem. §§ 42, 80. This is not contested by the opposing counsel, but he meets it on the ground that "the whole gist of the railroad company's case is that the commission have no discretion which authorizes it to fix rates in the manner fixed in this case; [and] admits that if the act of the legislature gives it such scope, its discretion is absolute between the nether limits of a living interest upon the investment and the upper limit of attainable profit, but it cannot go below the nether limit, for then it trenches upon constitutional rights. When there is no power there can be no discretion; and the commission reaches the limit of its power when in its downward course of reduction it reaches the point where a further descent would deprive the railroad company of a just compensation for its property.

There is no denial, and could be none, as will be evident from a slight consideration of sections 5 and 6 of the act quoted above, that it gives discretion to the commissioners in the fixing of reasonable and just rates; and hence this qualified denial is but saying that the commission exercised its discretion to a wrongful extent. It may be granted that if, by enforcing the rates complained of, the company would have its property taken without just compensation, or would be deprived of its property without due process of law, the first would be a violation of the constitution of the State, the second a violation of the constitution of the United States, and that neither the legislature nor the commission under her law could do either. But we are not at this point called upon to say whether such would be the effect of those rates, or whether the court has authority to adjudicate upon the reasonableness of the rates, or whether the judgment of the commission as to reasonableness is to be taken as conclusive. These are questions excluded from our consideration by the fact that the law refuses authority to enjoin the discretionary action of executive officers. It does not matter that the exercise of the discretion works an injustice or wrong. In many of the reported cases (that of *Towle v. State* for one), the inhibition was held to apply, though the officer was legally wrong in the conclusion reached as to the rights of the party whose case was brought within his discretion, and we do not see that it makes any difference whether those rights are founded on mere legal protection or on constitutional protection. The simple test is whether the decision of the officer is one his discretion authorizes him to make; and, if it is, the court is powerless to control him. Where this discretion exists, *mandamus* does not lie to direct the manner of its use, nor will injunction step in to control or intercept its use.

Discretion-
ary power
of officer
not con-
trollable.

It is proper to say, however, that this restraint upon proceedings by the court does not intend a denial of the legal or constitutional rights of any person, but only that the party aggrieved must seek his redress in some other way than by a suit against the officer in fault. In the present case, for instance, if the commissioners have exercised their discretion in a manner to invade the legal or constitutional rights of the complainant, that will be available for defence in any action against said complainant founded on the violation of the regulations of the commissioners. This is clearly recognized in the case of *In re Ayers*, where the court, though holding the injunction against State officers restraining them from bringing suits in the name of the State to be void, intimated that rights which could not be thus enforced could be protected in defence of suits against the injured party. See opinion, 123 U. S. 494, 495.

If the act creating the commission was unconstitutional and void, it may be that the commissioners, not in such case being officers, but only individuals really unclothed with office, would be subject to suit, as a void act could not confer any discretion on them; but its constitutionality is not contested, except against the extent of power claimed for the commission—"the power of the legislature to create a commission with power to make schedules which shall be *prima facie* evidence of reasonableness of rates fixed by it," not being doubted by the company's counsel, save that "it cannot make them conclusive." In regard to this, it is said that a conclusive determination of the reasonableness of rates by the commission would be the exercise of judicial power, which is prohibited by the constitution of the State. But if this be so, it does not affect the question of the liability of those officers to the present suit. It does not remove the protection which they have by virtue of the discretion given to them to fix reasonable and just rates; a wrong exercise of that discretion, as we have said before, not varying the rule which relieves them from suit.

It is said, further, that if the power claimed is not a judicial one, then it is one that involves legislative power, and for that reason is prohibited by the constitution of the State. If this has reference to the conclusiveness of rates, as the connection would seem to indicate, what we have just said respecting the exercise of judicial power applies equally here. But if it is meant that the power to fix rates is so far legislative that it cannot be delegated to a commission, that presents a more vital question, and, without considering whether it may be similarly disposed of, we go to its independent merits. It may be remarked *in limine* that the power of the legislature to regulate and fix the charging rates of

railroad companies chartered by the State, where the charter itself in a contractual view does not surrender the right to exercise the power, is not disputed; but that it is a power the legislature may forego exercising, and when it does that, it leaves its exercise to some other agency authorized by its law to act, to wit, the corporation. In many instances this is done as to all rates; and for the company before us it is done, except as to the maximum passenger rate. The regulating and fixing of rates, therefore, is not an inalienable, exclusive function of the legislature; and if it may leave that to the corporation, why may it not delegate it to a different body? The public interest involved is the same, whether reached by the corporation or by a supervisory commission.

We are not without authority on the question. Our act is taken almost entirely from an act of the State of Georgia. In the case of *Georgia R. v. Smith*, 70 Ga. 694, the constitutionality of the latter act was attacked, and on this subject of the delegation of authority to the commission was held not to be unconstitutional. The Georgia constitution, like ours, gave authority to the legislature to regulate rates. By the former, the constitution "conferred upon the legislature the power of regulating railroad freights and passenger tariffs, preventing unjust discriminations, and requiring reasonable and just rates of freight and passenger tariffs." By ours "the legislature is invested with full power to pass laws for the correction of abuses, and to prevent unjust discrimination and excessive charges by persons and corporations engaged as common carriers in transporting persons and property, or performing other services of a public nature; and shall provide for enforcing such laws by adequate penalties and forfeitures." There is no material difference. The court says in its opinion in the case cited above that "it certainly was not contemplated that the details of rates to be fixed over the many miles of railway in the State should be settled and determined by the legislature. The many influences that combine to cause changes in the ever-varying vicissitudes of trade and travel were neither overlooked nor forgotten by that body. The utter impossibility of preparing, by the legislature, just and proper schedules for the various railroads, with their differences of length, locality, and business, appears to us to be so clear and manifest as that to have entertained it would have been absolutely absurd; and especially so, when it is remembered that schedules, just and right where arranged for the months of winter, might be ruinously unjust and wrong for the months of summer: or that such as were proper for the year of the meeting of the general assembly might the succeeding year well nigh bankrupt every railroad corporation in the State."

Examination of authorities.

In *Tilley v. Railway Com'rs*, 4 Woods, 427, the same question as to the constitutionality of the Georgia act was passed upon; the court discussing more fully the subject of delegation of authority to the commission to fix rates, and reaching the same conclusion. The reasons given are on the line of those in the Georgia case. Thus, "the fixing of just and reasonable maximum rates for all the railroads in the State is clearly a duty which cannot be performed by the legislature, unless it remain in perpetual session and devote a large portion of its time to its performance. The question, 'What are just and reasonable rates?' is one which presents different phases from month to month, upon every road in the State, and in reference to all the innumerable articles and products that are the subject of transportation. This question can only be satisfactorily solved by a board which is in perpetual session, and whose time is largely given to the consideration of the subject. It is obvious that to require the duty of prescribing rates for the railroads of the State to be performed by the general assembly, consisting of a senate with forty-four members, and a house of representatives with one hundred and seventy-five, and which meets in regular session only once in two years, and then only for a period of forty days, would result in the most ill-advised and haphazard schedules, and be productive of the greatest inconvenience and injustice in some cases to the railroad companies, and in others to the people of the State. It is impracticable for such a body to prescribe just and reasonable rates. To insist that this duty must be performed by the general assembly itself, is to defeat the purpose of that clause of the constitution under consideration." Under a Mississippi statute, creating a commission with supervisory powers over railroad rates, it was held to be constitutional by the supreme court of the State, and also by the supreme court of the United States, although there was vested in the commission authority to regulate and change rates. *Stone v. Yazoo & M. V. R. Co.*, 62 Miss. 607; *Stone v. Trust Co.*, 116 U. S. 307. The question of delegation of legislative power was not directly discussed in these cases, but was necessarily involved; and the authority given to the commission by the act to regulate rates could not have been sustained, except upon the conclusion that such authority was constitutionally given. Other cases announcing the same conclusion are *State v. Chicago, M. & St. P. R.*, 37 N. W. Rep. 782, and *Chicago & N. W. R. Co. v. Dey*, published in 35 Fed. Rep. 866. We find no decision, and think there is no good reason, to the contrary. There are cases upon similar statutes of other States where this question has been passed *sub silentio*, but this being only indirect support of our conclusion these need not be cited. We hold that the legislature, in the act under consideration, did not delegate to the commission any power so far its own, exclusively, that it could not be delegated

Under the views on which we decide this case, it is unnecessary to determine the other questions appearing in the record.

The bill should be dismissed, and it is so ordered.

PENSACOLA AND ATLANTIC R. CO.

v.

STATE (six cases).

(*Florida Supreme Court, May 1, 1889.*)

Railroad Commission—Regulation of Charges—Discretion—Constitutional Law.

—The enforcement of a tariff of freight and passenger rates, which will not pay the expenses of operating a railroad, *held*, upon the pleadings, to show an abuse of the discretion given to railroad commissioners by the statute authorizing them to prescribe reasonable and just rates of freight and passenger transportation, and to amount to a taking of the railroad company's property without just compensation.

Same—Schedule of Rates—Reasonableness—Evidence.—The effect of the provision of the railroad commission statute that the schedules of rates fixed by the commissioners shall, in any action brought in the courts of this State against a railroad company, be deemed and taken as sufficient evidence that the rates fixed therein are just and reasonable rates for the transportation of passengers and freights and cars, is not to make such schedules conclusive as against judicial enquiry, but is to provide a new mode of proving the reasonableness and just character of the rates fixed by the commissioners, and make the schedules competent and adequate evidence of the correctness of the action of the commissioners in the absence of countervailing proof that they have exceeded their powers, or abused their discretion, and invaded some right of the railroad company.

Same—Discretion of Commissioners—Review.—Where a tariff of freight and passenger rates has been established by the railroad commissioners, and the railroad company and the commissioners differ as to whether such rates, considered as a whole, will prove remunerative to the company, and there is room for a difference of intelligent opinion on the question, the courts cannot interfere or substitute their judgment for that of the commissioners, but the tariffs, as fixed by the commissioners, must, in so far as the courts are concerned, be left to the test of experiment.

Same—Power of Court.—The courts have no power to make freight or passenger tariffs.

Same—Several Rates—Complaint.—The courts will not interfere or grant any relief to a railroad company upon a complaint made as to one or several rates only, or where the freight and passenger rates established by the commissioners are not assailed as an entirety.

APPEALS from Circuit Court, Jackson and Gadsden Counties.

W. A. Blount for appellant.

The Attorney General for the State.

RANEY, C. J.—There are before us, on appeal from judgments of the circuit court, several actions instituted by the State against the appellant to recover penalties under the statute approved

June 7, 1887, and commonly known as the "Railroad Commission Act." The cases from Gadsden county, in the second circuit, were brought last July, and the penalty adjudged in each of them is \$2,500. That from Jackson county was commenced last April, and the penalty denounced in it is \$2,000. Upon the conclusion of the argument made before us at the present term, we announced that the decision of these cases would, in view of the public interests involved, be disposed of at an early day.

The pleadings are similar in substance. The declaration in one of the Gadsden county cases, which we take as a type of all, alleges that the railroad company is a body corporate, organized under a special statute of this State, approved March 4, 1881, (chapter 3335), and operating a railroad from Pensacola to River Junction, both of which points are in the State, and that on a certain day in April of the year 1888 it did "wilfully charge, collect, and demand, and receive" of a person (naming him), for transporting him as a passenger from River Junction to Marianna, another point on the road, a distance of twenty-six miles, the sum of \$1.25, and that this sum was more than three cents per mile, the rate prescribed by the railroad commissioners, and that the sum so collected was more than a fair and reasonable rate of toll or compensation for the transportation of the passenger, and that eighty cents, the sum which the company was allowed by the above rate prescribed by the commissioners (and a special rule as to amounts ending in other figure than 5 or 0) to charge, collect, and receive, was a just and reasonable rate of compensation; and that by thus wilfully collecting and receiving the stated excess over and above what it was allowed by the commissioners' rules to charge, collect, and receive, the railroad company became and was guilty of extortion, and of a violation of the rules and regulations prescribed and published by the commissioners, by which rules and regulations the commissioners made, among others, a schedule or tariff of just and reasonable rates for the transportation of passengers on appellant's railroad.

It is also alleged that the commissioners gave notice to the principal officer of the railroad company of this violation, and directed the company to make reparation to the passenger for the injury and wrong so done him, by refunding to him the excess of forty-five cents, within thirty days, as prescribed by the statute; but it failed and refused to do so, and thereby forfeited to the State and incurred a penalty of \$5,000.

To this declaration the railroad company interposed four pleas, and the State demurred to them as insufficient in law. The demurrer having been overruled, and the company not electing to plead over, judgment was entered, the circuit judge fixing the penalty at the amount indicated above.

Section 13 of article 16 of the constitution of this State is as follows: "The legislature is invested with full power to pass laws for the correction of abuses, and to prevent unjust discrimination and excessive charges by persons and corporations engaged as common carriers in transporting persons and property, or performing other services of a public nature, and shall provide for enforcing such laws by adequate penalties or forfeitures."

**Constitution—
Legislature
authorised
to regulate
common
carriers.**

Whether or not there is in this section a grant of any power which the legislature did not have before, it is unnecessary for us to decide. There is, however, upon the face of it, an apparent purpose to correct abuses. It shows that the convention in adopting and the people in ratifying the section were impressed with a belief that there existed a necessity for the enactment of laws correcting abuses, preventing unjust discriminations and excessive charges by common carriers in transporting persons and property, and that confidence in the sufficiency of the common-law remedies as agencies by which the individual citizen could find protection against or relief as to these evils had failed. As to the necessity for the command thus made by the people to the law-making power, the judicial department is concluded by the existence of the section.

To effect the end proposed by the constitution, the first legislature assembled under it enacted the railroad commission law, which was approved June 7, 1887, it being chapter 3746 of our statutes. This statute provides for the appointment of three commissioners, and (section 5) that they shall "make and fix reasonable and just rates of freights and passenger tariffs, to be observed by all railroad companies doing business in this State on the railroads thereof," and just and reasonable regulations as to charges for the necessary handling and delivery of freights at any and all points, and for preventing discrimination in the transportation of freight and passengers, and reasonable and just rates of charges for the use of railroad cars carrying freight and passengers on said railroads, no matter by whom owned or carried, and just and reasonable rules and regulations to be observed by said railroad companies on said railroads, to prevent the giving of any rebate or bonus, directly or indirectly, and from misleading or deceiving the public in any manner as to the real rates charged for freight and passengers. It also confers power upon the commissioners to designate and fix by rules and regulations the difference in the rates of freight and passenger transportation for longer or shorter hauls, and to ascertain what shall be the limits of longer and shorter distances.

**Statutory
enactment.**

There is in the above section also a provision to the effect that

nothing in the act shall abridge or control the rates for freight which comes from or goes beyond the State, and for which freight less than local rates for carrying the same is charged.

By the sixth section the commissioners are authorized and required to make for each railroad corporation a schedule "of just and reasonable" rates of charges for the transportation of passengers and freights and cars, and "said schedule shall in any suit brought against any such railroad corporation wherein is involved the charges of any such corporations for the transportation of any passengers or freight or cars, or unjust discrimination in relation thereto, be deemed and taken in all courts of this State as sufficient evidence that the rates fixed therein are just and reasonable rates of charges for the transportation of passengers and freight and cars upon the railroads." The commissioners are required to publish these schedules, and the railroad companies to post them in a manner stated, and any such schedules purporting to be printed and published shall be received and held in all suits as *prima facie* the schedule of said commissioners, without further proof than its production with a certificate from the commissioners of its being a true copy of the schedule prepared by them for the railroad company or corporation therein named, and that it has been duly published as required by law, stating the name of the newspaper, the date and place of publication.

This section also enacts that the commissioners shall, from time to time, and as often as circumstances may require, change and revise the schedules.

Sections 7 to 13, inclusive, provide for a protest by the railroad company against the enforcement of any and all "rates of freight and passenger tariffs, or other rules and regulations," made by the commissioners, and a hearing and decision thereon by them, and for an appeal from the decision to a board of revisers, consisting of the comptroller, secretary of state, commissioner of agriculture, attorney-general, and the treasurer of the state, and a hearing and decision by such board. Section 14 gives the same right of protest to any individual, corporation, firm, or partnership.

Section 5 enacts, *inter alia*, that if any railroad corporation, organized under the laws of the State, and doing business therein, "shall wilfully charge, collect, demand, or receive more than a fair and reasonable rate of toll or compensation for the transportation of passengers or freight of any description," it shall be "deemed guilty of extortion, and upon conviction thereof shall be dealt with as hereafter provided."

Section 17 provides that if any railroad company doing business in this State, by its agent or employes, shall be guilty of a violation of the rules and regulations prescribed by the commissioners, and if, after due notice of such violation given to the principal office thereof, ample and full recompense for the wrong

and injury done thereby to any person or corporation, as may be directed by said commissioners, shall not be made within 30 days from the time of such notice, such company shall incur a penalty for each offence of not less than \$100, nor more than \$5,000, to be fixed by the presiding judge. This action is to be in the name of the State, and to be instituted by the commissioners through the attorney general or a State attorney, and in the county where the wrong was perpetrated.

Under section 19 all fines collected under the act are to be paid to the county treasurer for county school purposes, and the rules of evidence in all cases under the act are the same as in civil actions, except as hereinbefore provided.

There are other features of the statute, but it is not necessary to set them out now. They give a personal remedy, in addition to those provided by the common law, to individuals wronged by a violation upon the part of a railroad company of any rule or regulation of the commissioners, and relate to matters of detail not necessary to an understanding of the statute in so far as either its general purpose or its effect in the case before us is concerned.

The question of the extent of the power of the legislature in the regulation of the charges of common carriers for carrying persons and property is not settled or defined.

The doctrine of the case of *Munn v. Illinois*, 94 U. S. 113, it being one of the so-called Granger cases reported in that volume, is as follows: "Where one devotes his property to a use which the public have an interest in, he in effect grants to the public an interest in such use, and the property, during such use, ceases to be a subject of mere private right, and the owner must, to the extent of that use, submit to be controlled by the public for the common good so long as he maintains such use. The devotion of it to the public use takes from him the right to make arbitrary or excessive charges for its use by the public, and he must be content with a reasonable compensation. In the absence of legislative regulation, what is a reasonable compensation is under the common law a matter to be determined by the courts; but this may be changed by statute, and the legislature may exercise it by prescribing the maximum rates of charges to be made by common carriers, ferries, hackmen, bakers, wharfingers, and others of like avocations, and has often done so."

The cases upon which the controlling opinion in the *Munn* case is based recognize the right of the owner of the property applied to public use to a reasonable compensation, and so does that opinion; yet, admitting that the legislature may abuse its power, that opinion says that "for protection against abuses by the legislature the people must resort to the polls, and not to the

courts." In *Chicago B. & Q. R. Co. v. Iowa*, Id. 155, another of the Granger cases, it is held that railroad companies are carriers for hire; that they are incorporated as such, and given extraordinary powers in order that they may the better serve the public in that capacity, and they are therefore engaged in a public employment, affecting the public interest, and under the doctrine of *Munn v. Illinois*, subject to legislative control as to their rates of fare and freight, unless protected by their charters. This railroad company, says the opinion, page 161, "has in the transaction of its business the same rights and is subject to the same control as private individuals under the same circumstances. It must carry, when called upon to do so, and can charge only a reasonable sum for the carriage. In the absence of any legislative regulation upon the subject, the courts must decide for it, as they do for private persons when controversies arise, what is reasonable. But, when the legislature steps in and prescribes a maximum of charge, it operates upon this corporation the same as it does upon individuals engaged in a similar business." It is also said that, in the absence of a contract to the contrary in the charter, the company invested its capital, relying upon the good faith of the people and the wisdom and impartiality of legislators for protection against wrong under the form of legislative regulation.

In *Stone v. Farmers' Loan & Trust Co.*, 116 U. S. 307, 325, it is said: "It is settled (in that court) that a State may limit railroad transportation charges within its territory, unless restrained by some contract in the charter, or unless the regulation amounts to one of foreign or interstate commerce." In this opinion, after stating that the charter of the Baltimore & Ohio Railroad Company gives authority "to carry persons and property," it is remarked: "This of itself implies authority to charge a reasonable sum for the carriage. In this way the corporation was put in the same position as a natural person would occupy if engaged in the same or like business. . . . The natural person would be subject to legislative control as to the amount of his charges. So must the corporation be."

Immediately following the above we find this very suggestive paragraph in the opinion: "From what has thus been said it is not to be inferred that this power of limitation or regulation is itself without limit. This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation.

Under pretence of regulating fares and freights the State cannot require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use without just compensation or without due process of law. What would have this effect, we need not now say, because no tariff has yet been fixed

by the commission, and the statute of Mississippi expressly provides 'that in all cases of trials brought for a violation of any tariff of charges as fixed by the commission, it may be shown in defence that such tariff so fixed is unjust.'

This language is unquestionably greatly in restraint of that given above, as used in the former or Granger cases, the purport of which, considered in the abstract, was that, whatever the wrong done, the judiciary was powerless, and the resort to the polls at the periods prescribed by law the only remedy. Of course, in many cases ruin might be effected, or the injury consummated, to at least a great extent, before the people could be appealed to against the "power to destroy," or "confiscation," or "taking of property for public use without just compensation or due process of law." The language of the preceding paragraph would never have been used but in response to a conviction that some of the expressions of the former cases had gone too far.

If there be anything in the fact that *Stone v. Trust Co.* differs from the several Granger Railroad Cases in that the Mississippi statute delegated the power to make rates to commissioners, the same is the fact in the case before us. In the Granger cases the legislature fixed the rates.

There is in the *Munn* case, 125, language tending towards the above paragraph from the *Stone* case, it being there said, in reply to the argument that the Illinois legislation was repugnant to the Fourteenth amendment, that "down to the Fourteenth amendment it was not supposed that statutes regulating the use, or even the price of the use, of private property necessarily deprived an owner of his property without due process of law. Under some circumstances they may, but not under all." About the same idea is more briefly expressed in the last paragraph, on page 335, in the *Stone* case.

The extent to which this power of regulation by the legislature may be carried in the absence from a railroad company's charter of a contract expressly authorizing it to charge up to a certain limit, is a serious question, and one which we cannot evade in this case.

The third plea of the railroad company is that it could not pay the expenses of operating its road by charging for transportation of persons and things the rates fixed for it by the railroad commissioners, or by charging less rates than those charged by it to the passenger named.

The demurrer of the State admits the averments of this plea to be true.

The admission of the demurrer is that if the company had adopted the rates of transportation of passengers and freight, or had charged less than it charged the passenger, it could not have paid its operating expenses. The legal proposition asserted by the

circuit court in sustaining the demurrer to this plea is that the State may, through the instrumentality of the commissioners, prescribe, and may enforce through the courts, passenger and freight tariffs which do not pay the railroad company the expenses of operating its road; that the judgment or discretion of the commissioners is conclusive as to the reasonableness of the rates as against the interference of the courts, or any other power, except it may be the legislature. This judgment involves, of course, the conclusion that a rate of charges which is not sufficient to pay the actual necessary and reasonable expenses of operating the appellant's road is a reasonable rate, and neither a taking of its property without due process of law, or without just compensation, or anything else intimated by the paragraph from the Stone case as being unauthorized. It is a plain declaration that the company must, as against any judicial relief, carry without reward if the commissioners merely say so in a rule promulgated according to the forms of the statute.

The language of Chief Justice WAITE, given above, speaking for a majority of the court in the Granger cases, has been appealed to, to sustain this conclusion. There is nothing in the facts of any of these cases which makes it an adjudication of the conclusion contended for. There was in the Munn case no issue or pretence that the warehouse charges prescribed by the Illinois statute were unremunerative. The real question was whether or not the warehouse property, as used, was subject to legislative regulation as to what should be a reasonable compensation. In *Chicago, B. & Q. R. Co. v. Iowa*, *supra*, the representation made by the bill was that prior to the Iowa statute, prescribing rates, the lessee company had fixed its charges with a view to furnishing the greatest facilities for transportation at the lowest rates compatible with the duty of keeping the road in good condition, defraying the expenses of operation, paying interest on the indebtedness, and earning reasonable dividends for stockholders, and that the earnings had been barely adequate under careful and economical management for these purposes, and that these ends could not be attained if the company should be compelled to conform to the statutory rules. If the bill had presented a case to the effect only that the statutory rates would not enable the company to defray the expenses of operation, including keeping the road in good condition, it would have approximated the issue now under consideration. In *Peik v. Chicago & N. W. R. Co.*, 94 U. S. 164, mortgage bondholders alleged that the company's tariffs, in force before the passage of the Wisconsin statute limiting passenger and freight charges, did not provide sufficient income "to pay interest on its debt, the legal rate of interest allowed by the laws of the State

Fixing rate is sufficient for payment of operating expenses.

Authorities discussed.

to its stockholders and expenses," and that the enforcement of the statute impaired the obligation of the contract between the bondholders and the company, and violated the prohibition in the State constitution against taking private property without just compensation. In *Lawrence v. Same, Id.*, the bill was by stockholders, but substantially the same, and in the opinion in these two cases it is said, page 176: "In *Munn v. Illinois*, and *Chicago, B. & Q. R. Co. v. Iowa*, we decided that the State may limit the amount of charges by railroad companies for fares and freights, unless restrained by some contract in the charter, even though their income may have been pledged as security for the payment of obligations incurred upon the faith of the charter. So far this case is disposed of by these decisions." In *Chicago, M. & St. P. R. Co. v. Ackley, Id.* 179, the action was by the company to recover for freight actually carried a compensation greater than the maximum rate fixed by the Wisconsin statute, and upon the ground that the amount sought to be recovered was no more than a reasonable rate, and it was held that as between the company and the freighter there was a statutory limitation for transportation "actually performed." "If," says the opinion, "the company should refuse to carry at the prices fixed, and an attempt should be made to forfeit its charter on that account, other questions might arise which it will be time enough to consider when they are presented. But for the goods actually carried the limit of the recovery is that prescribed by the statute." The company, having actually carried the freight, could not claim more than the statutory rate, but it is plain that the court felt that if it had refused to carry at such rate other questions might arise. It does not appear that the company had even given notice to the shipper that it would claim more than the statutory rate for the carrying to be done by it.

The enunciations of an opinion are not binding as authority except as to the points presented by the facts of the case for adjudication. There is in none of the Granger cases any fact suggesting that the rates resisted were unremunerative. The same is true in the *Tilley* case, 4 Woods, 427. It is only as to the facts presented by the record that an opinion speaks authoritatively. None other are in the judicial mind. We are still not remitted solely to this doctrine, and in a critical view of the facts of the Granger cases to ascertain the meaning of the majority of the court for whom the late chief justice was speaking in them. In the paragraph quoted from the *Stone* case that venerated judge clearly limits the effect of the broader language used on the former occasion, and his limiting words are repeated after his death, nearly in full, in the opinion in the case of *Dow v. Beidelman*, 125 U. S. 689. These words show, and were, we think, intended to show, that there was a limit to regulation, even if it

be that those used in the *Munn* case in relation to the Fourteenth amendment were not so intended. In *Georgia R. & Banking Co. v. Smith*, 128 U. S. 174 (decided last October), FIELD, J., speaking for the entire court, says that the adjudications of that court are that the power of the State legislature to regulate railroad fares within the limits of the State is subject to the limitation that the carriage is not required without reward, or upon conditions amounting to taking property for public use without just compensation, or that what is done does not amount to a regulation of foreign or interstate commerce.

We do not think the *Granger* cases to be authority for the proposition that the legislature, acting even for itself, and not through commissioners, is omnipotent as against every one but the people in the matter of regulating rates, except to the extent that they may control profits. They seem to hold that the legislature may itself go this far as to profits, even confining the language of the opinions to the facts, in one or more of the several cases. There is, under the plea mentioned, no question before us as to what the profits shall be. Admitting, for the purposes of the case, that between the line just above a compensatory rate and the one defining excessive charges, or extortion, the discretion of the legislature may be conclusive as against judicial interference, or even admitting that in the exercise of a legislative discretion the law-making power may itself prescribe for common carriers rates that will not compensate, and that courts cannot prevent the enforcement of them, we yet do not think that any such power exclusive of judicial enquiry has been given, if it could have been, to the railroad commissioners by our statute. Of course, no such power was given to the Mississippi commissioners. It could be shown "in defence" that their rates were unjust, and were therefore subject to both judicial, and, of course, legislative, supervision or control as to their reasonableness, as is clear from the statement of facts in the *Stone* case, 116 U. S. 314.

The grant to the appellant company of the "power . . . to make, build, maintain, equip, use, and operate a railroad" between the points designated, particularly when considered in connection with another provision of its charter act, to the effect that it shall not charge more than five cents per mile for passenger transportation, and making the exaction of a greater sum by any officer or agent of the company a misdemeanor (sections 1, 8, c. 3335), gave it authority to charge a reasonable sum for the carriage of persons and property. The duty of a railroad company to carry and charge only a reasonable compensation are incidents of its occupation as a common carrier. The authority to carry implies authority to charge a reasonable compensation for the carriage. *Winona & St. P. R. Co. v. Blake*, 94

**Railroad
company
entitled to
reasonable
compensa-
tion.**

U. S. 180; *Stone v. Trust Co.*, 116 U. S. 329. To earn money is a purpose and legitimate object of a railroad company. Though a public highway, and subject to public control as such in many respects, yet it differs from the ordinary public highway in the feature of being private property. A railroad and its equipment represent the private capital invested in them, and the income from the operation of the same is looked to and relied upon for the expense of at least the maintenance and operation. This is the ordinary rule, and in view of the particular pleadings now under consideration is the one applicable here.

To require of a railroad company, which has been incorporated and given power to construct and operate a railroad, and charge reasonable rates for the transportation of persons and property, and has already constructed its road, that it shall carry persons and property at rates of charges not sufficient to pay the expenses of operating the road, is, as a matter of fact, to compel it to carry without reward, and to take the use of its property without just compensation. The same would be equally true of a natural person who might be authorized to operate a railroad, and upon whom, after he had built and equipped his road, the law-making or other power should enforce such terms of business. A railroad is of no value except in the use of it. Kept in idleness, it is a source of expense, and subject to decay. Operated without remuneration, its ruin is hastened, and a constant accumulation of indebtedness becomes an inseparable incident to its ownership unless means from independent sources are applied to the cost of its maintenance and operation, and if this is done the enforced consumption of such means is in its character of the same effect upon the owner. It is the duty of a common carrier to receive and carry whatever is properly offered to it for carriage. As to freights it is an insurer, and its liability, unless limited by special agreement, extend to all losses not occasioned by the act of God or the public enemy. For injuries occurring to passengers from the unsafe condition of the roadbed, or from insufficient or defective equipment, or unskilful and negligent management, the company is responsible in damages. The safety of human life and the good of every public interest require of them the soundest condition, the fullest equipment, and most skilful and careful operation; and it is the province of the courts to enforce, when properly called upon, the law which imposes these entirely proper and indispensable demands. A railroad which cannot earn enough to pay its operating expenses because it is not permitted by the State to charge rates sufficient for such purpose, must, as a natural result of such regulation, become a nuisance, and a menace to human life. Assuming that a railroad company can be compelled to operate its road, the result follows, if its rates of charges be

**Effect of
fixing rate
insufficient
for current
charges.**

fixed against its will at less than cost of operation, that its property is used for the benefit of the public without reward or just compensation. If it can be compelled to operate for a little less than the expenses of doing so, so can it for much less. This principle is made more onerous, but not more unjust, by the greater degree to which the exercise of the power may be carried. These propositions, as matters of fact, seem to us entirely true. If the rates prescribed by the State or a commission will not pay operating expenses, and the company is thereby compelled to stop its operation, the company is deprived of the use of its property and it is, in effect rendered valueless.

In *Pumpelly v. Green Bay Co.*, 13 Wall. 166, it was held that by "the general law of European nations and the common law of England it was a qualification of the right of eminent domain that compensation should be made for private property taken or sacrificed for public use; and the constitutional provisions of the United States, and of the several States which declare that private property shall not be taken for public use without just compensation, were intended to establish this principle beyond legislative control. It is not necessary that property should be absolutely taken, in the narrowest sense of that word, to bring the case within the protection of this constitutional provision. There may be such serious interruption to the common and necessary use of the property as will be equivalent to a taking within the meaning of the constitution. The backing of water so as to overflow the lands of an individual, or any other superinduced addition of water, earth, sand, or other material of artificial structure placed on land, if done under statutes authorizing it for the public benefit, is such a taking as by the constitutional provision demands compensation."

An injury resulting directly to a railroad company from the action of railroad commissioners as to it is, we think, easily and clearly distinguishable from indirect and consequential damage resulting from public improvements. *Northern Transportation Co. v. Chicago*, 99 U. S. 635.

Railroads are not in themselves, or necessarily, public nuisances, and detrimental to public morals, public health, or public safety. While their operation in many, if not all, respects, calls for the exercise of special skill and eminent care, and they are to be so used as not unnecessarily to injure another, as is all private property, and their use may, to a certain extent, be regulated, they cannot, nor can their ordinary use, reasonably be declared to be prejudicial to the general welfare. It belongs, of course, to the legislative department to exert what is known as the "police powers" of the State, and to determine primarily what measures are appropriate or

**Exercise of
police power
of State.**

necessary for the protection of the morals, the health, or the safety of the public, "but," says the supreme court of the United States, in *Mugler v. Kansas*, 123, U. S. 661, "it does not follow that every statute, enacted ostensibly for the promotion of these ends, is to be accepted as a legitimate exertion of the police powers of the State. There are of necessity limits beyond which legislation cannot rightfully go. . . . The courts are not bound by mere forms, nor are they to be misled by mere pretences. They are at liberty, indeed, are under a solemn duty, to look at the substance of things whenever they enter upon the enquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the constitution." In this case it was held that the destruction, through the exercise of the police power, and without allowing compensation of the property used in violation of law in maintaining a public nuisance, is not taking of property for public use, and does not deprive the owner of it without due process of law, and that a State has the constitutional power to declare that any place kept and maintained for the illegal manufacture and sale of intoxicating liquors shall be deemed a common nuisance, and be abated. It is said in the opinion "that we cannot shut out of view the fact, within the knowledge of all, that the public health, public morals, and the public safety may be endangered by the general use of intoxicating drinks, nor the fact, established by statistics accessible to every one, that the idleness, disorder, pauperism, and crime existing in the country are in some degree at least traceable to this evil."

Certainly railroads cannot be classed with intoxicating liquors, or with property used in their manufacture and sale, as subjects of the police power to the extent of being liable to be taken or destroyed, or their use be prohibited, without compensation, as dangerous to the health, morals, or safety of the public. The police power rests "upon the fundamental principle that every one shall so use his own as not to wrong or injure another" (123 U. S. 667), and there is not in a railroad, kept in good condition, and operated properly, anything offensive to this maxim. A statute which should propose to make all railroad property existing at the time of its enactment a nuisance, if its ordinary use as such should be continued after a certain future day, and prohibit its use after such day without providing compensation for loss sustained from the prohibition of such use, would, we think, upon the doctrine of *Mugler v. Kansas*, be unconstitutional. The limit to the exercise of the police power, says Judge COOLEY, must

be this: "The regulation must have reference to the comfort, safety, or welfare of society. They must not be in conflict with any of the provisions of the charter, and they must not, under the pretence of regulation, take from the corporation any of the essential rights and privileges which the charter confers." *Cooley*, Const. Lim. (5th ed.) marg. p. 577; *Jackson v. Plank Road Co.*, 9 Mich. 285; *Pingry v. Washburn*, 1 Aikins, 264.

Neither in our railroad commission law, nor in the constitutional provision upon which it is based, is there anything which of itself declares or implies such a prohibition, or contemplates the making of one by the commissioners: yet if the enforcement of the rates prescribed by the commissioners would have this effect upon the railroad in question, we think, considering the particular pleadings now under discussion, it would be, as against the railroad company, an infraction of the provision of our declaration of rights (section 12), that no person shall be deprived of his property without due process of law, nor shall private property be taken without just compensation.

The railroad commissioners have prescribed a passenger rate of three cents per mile as a reasonable and just rate for the appellant company. In the case before us the company has charged at the rate of 4 11-26 cents, or, in other words, have charged about 50 per cent. more than the commission rate. Upon the pleadings the State contends that the commissioners' rate is reasonable and just, and that of the railroad company unreasonable and unjust; yet it admits that the railroad would not have earned expenses of operation if it had carried at the schedule of passenger and property rates fixed by the commission, or by charging at a less rate than that which the passenger in this case was required to pay. What the commission rates for carrying property are we are not advised. We only know, then, that the commissioners have prescribed such rates generally, as the State admits, will not pay the operating expenses, and these include a passenger rate of three cents. The legal problem involved in these facts is whether the action of the commission is to be regarded as conclusively lawful, and within the limits of their powers, or as beyond them, and infringing the constitutional rights of the company.

We have found no case which holds that a railroad company can be compelled to carry at unremunerative rates. In *Chicago & N. W. Ry. Co. v. Dey et al.*, the Iowa railroad commissioner, 35 Fed. Rep. 866, decided by Judge BREWER of the United States circuit court (see, also, *Chicago, B. & Q. R. Co. v. Dey*, 38 Fed. Rep. 656), it was held that, where the rates prescribed will not pay some compensation, the courts may give protection against

their enforcement. Some rule, he says, must exist, fixed and definite, to control the action of the courts, for a chancellor is not at liberty to substitute his discretion as to the reasonableness of rates for that of the legislature. The legislature has the discretion, and the general rule is that where any officer has discretion his acts within the limits of that discretion are not subject to review by the courts. Decisions of the supreme court, he says, seem to forbid such a limit to the power of the legislature, as that its lowest rates must allow a profit equal to the lowest current rate of interest (say 3 per cent.), and the right of judicial interference exists only where the schedule of rates established will fail to secure the owners some compensation or income from their investment; and when some compensation is allowed by the rates, the question becomes one of legislative policy. In *Dow v. Beidelman*, 125 U. S. 680, the evidence showed that under the maximum passenger tariff of three cents, prescribed by the Arkansas statute, the net income of the road, with its existing traffic, would pay less than $1\frac{1}{2}$ per cent. on the original cost of the road, and only a little more than 2 per cent. on the amount of the bonded debt, without any proof, however, of the cost of the bonded debt or the amount of the capital stock, or of the price paid for the road; and this was held not to be a taking of the property without due process of law, and that the court had no means, under the facts, of determining, if it could under any circumstances, that the rate of mileage was unreasonable. Though, in the case of *State v. Chicago, M. & St. P. R. Co.*, 38 Minn. 281, it was held that the determination of the commissioners as to what are equal and reasonable fares and rates is conclusive, and that in proceedings by *mandamus*, to compel compliance with the rates recommended and published by them, no issue can be raised or enquiry had on that question; still that was not a case involving the entire rates, but only the rate on one article, and there was no contention that the entire tariffs, as prescribed by the commissioners, would not pay operating expenses. The fact that the tariff on simply one or several articles may be unremunerative is not ground for an assumption that the tariffs are so as a whole, nor reason to our minds for judicial interference in behalf of the railroad company.

Railroad company cannot be compelled to carry at unremunerative rates.

Whether, under a general law for the incorporation of railroads, like ours, where there is practically no restriction upon the number of railroads that may be built and operated, the construction of additional roads in a section of the State already amply supplied with such transportation facilities would present a case in which the exaction of prohibitory or otherwise onerous rates may be prevented, though it result in an impossibility for some or all of the roads to make expenses, we need not say; no such case is

before us. When it is said by the interstate commerce commissioners, in *New Orleans Cotton Exchange v. Cincinnati, N. O. & T. P. R. Co.*, 2 Interst. Commerce Com. R. 375 (decided November 26, 1888), that "wherever there are more roads than the business, at fair rates, will remunerate, they must rely upon future earnings for the return of investments and profits," we do not understand them to have meant that such roads must rely on the future for expenses also. The road there in question was making more than its expenses, but not enough to pay these and interest or fixed charges. In view of the undeveloped state of the law, each case must be decided upon its facts as it arises.

Confining ourselves to the case made by the pleadings,—where only one railroad is shown to traverse the territory in question, and on the one hand the commissioners say the company must not charge more than 3 cents, although it will compel a loss of money, and the company says it cannot pay operating expenses at the rates of freight and passenger charges prescribed by the commissioners, or without charging 4 and 11-26 cents per mile,—our opinion is that the action of the commissioners in prohibiting the larger rate is a palpable abuse of their discretion, and a trespass upon the rights of the company, and one which, if enforced with the freight rates prescribed, would amount in law and in fact to taking the property of the company without just compensation. It is not a reasonable rate, considered either with reference to the interests of the people or those of the railroad company, or both. If the enforcement of these rates is persisted in it must end in the dilapidation of the road, and imperil the lives and property of the people, and finally destroy an avenue of transportation which conveys persons in from, say, seven to nine hours, and at a cost of say \$7.25 (estimating at the rate of 4½ cents per mile), over a distance of 161 miles, which, before, it would have taken several days to travel through the same territory by the ordinary roads, at far greater expense; or, in the particular case before us, carrying a passenger 26 miles in less than an hour and a half for \$1.25, when before construction of the road the only means of conveyance was private conveyance, or a hack line, at the slow speed and personal inconvenience incident to such primitive mode of travel, including the passage of a river on an ordinary ferry. It would be idle to say that we cannot take judicial notice of the ordinary modes of conveyance formerly existing in this section of the country, or that the only means of railroad travel from the western portion of West Florida to the middle and eastern portions of the State were through the adjoining States of Alabama and Georgia.

Whether or not, as a matter of fact, the rates prescribed by the railroad commission will, including, also, its earnings from all sources of commerce beyond the control of such commissioners,

pay its operating expenses, is something which we are not called upon to express an opinion on. What we say is based simply upon the admission made by the demurrer to the third plea. Upon an issue being joined on this plea every source of income of the railroad company can be enquired into, and the necessity and reasonableness of every expense investigated and settled. It is not, as a matter of fact, to be presumed, outside the admissions of this demurrer, that the commissioners would impose upon this railroad a rate of 3 cents, under the circumstances indicated by the plea, if they thought, considering, also, the rates of freight adopted by them, that the company could not pay its operating expenses without charging at the passenger rate it has charged in this case. Under the statute the burden will be upon the company to make out a *prima facie* case, sustaining its plea, before the State will be called upon to introduce any evidence, and, if this be done by the company, the State must then, through the instrumentality of its commissioners, and any other proper means, establish the justice of the action of the commissioners in fixing the schedule of passenger and freight rates against the arraignment which the company has made of them in its third plea.

Although what we have said assumes that the legislature either cannot, or has not by the statute, shut out all judicial enquiry as to whether the commissioners, by their action, may deprive a common carrier of any constitutional right, or have exceeded the powers given them, yet it is proper to say a few words on the subject.

"Sufficient," as defined by Webster, means "adequate to suffice, equal to the end proposed, competent." Whether, in view of this definition, the word "sufficient," as used in the statute, can be held to mean "conclusive," may be a subject of debate if we look simply at the language just quoted from the statute. In prescribing the powers of the commissioners, the statute has authorized and required them to make "reasonable and just" rates of freight and passenger tariffs, and to make schedules "of just and reasonable" rates. Another section of the statute enacts that, if a railroad company shall wilfully charge more than "a fair and reasonable rate of toll or compensation for the transportation of passengers or freight," it shall be deemed guilty of extortion. It is apparent throughout the act, as is shown by extracts from it in the first pages of this opinion, that the purpose of the legislature was to secure nothing but reasonable and just rates, and in this the statute is in harmony with the constitution. The purpose of the provision making the schedules evidence was not to define the powers of the commissioners. It was to make or declare a rule of evidence, and relieve

Burden of proof.

Effect of provision that commissioners' schedule shall be conclusive.

the State or person suing a railroad company under the act from the burden of proving all the facts and details which would otherwise be necessary to entitle the plaintiff to a recovery in the absence of evidence in behalf of the company. All facts and details as to rates lie more peculiarly in the knowledge of the railroad company, and it is entirely reasonable that it should be visited with the burden of overthrowing the correctness of any rates established by the commission by the introduction of such facts and circumstances. The purpose of this provision being, then, a means adopted, not to secure reasonable and just rates, but to relieve the plaintiff from a more onerous rule of evidence, we think that "sufficient" does not mean "conclusive." Again, the harshness of the rule that a schedule shall be conclusive, would itself tend against such construction where there is any doubt. To authorize and require a ministerial body to make reasonable and just rates, and yet provide that proof of its action thereunder shall be conclusive evidence that its action was proper, and (no matter what the circumstances) that they could not be enquired into or questioned, would be very extraordinary legislation. The questionable character of any such legislation favors, of itself, a different construction. *Chicago & Alton R. Co. v. People*, 67 Ill. 11. In our opinion the effect of the provision was to provide a new mode of proving the reasonableness and just character of the rates, and make such proof competent and adequate evidence of the correctness of the action of the commissioners, in the absence of countervailing proof that they have exceeded their powers or clearly abused their discretion, and invaded some right of the railroad company. There is nothing in *Georgia R. Co. v. Smith*, 70 Ga. 694, inconsistent with this view.

It is argued that the State has granted to the appellant company more than 3,000,000 acres of land, to say nothing of lands inuring to it from the general government, and that this large grant of land was the security upon which appellant reposed, together with future earnings, when it constructed a railroad through a country with only eight inhabitants to the square mile.

It is true that by one section of the charter act of this company, the State granted to it "to aid in the construction of the road, the alternate sections of lands lying within six miles of and on each side of the road, granted by the United States to this State by the act of September 28, 1850," commonly known as the "Swamp-Land Act;" and by another section it granted to the company, "in consideration of the benefits that will accrue to the State from the construction of such railroad," 20,000 acres per mile, for each mile the company may grade, cross-tie, and iron, the lands to be those granted to the State by said act of congress, and lying "nearest the line of said railroad and extensions, and not otherwise granted."

Application
of proceeds
of land grant
to reduction
of rates.

There is nothing in the pleadings of this case to indicate what quantity of land, if any, has been actually received by the company under either of these grants; nor upon this demurrer, or the entire pleadings, can we assume that the rates have been fixed by the commission with regard to the reception by the company of any land under such grants. It would, in view of the pleadings and the consequently limited attention given the subject in argument, be entirely gratuitous for us to say anything as to what part the land grant can properly play in the matter of fixing rates. Upon issues properly made up, in fact upon an issue joined on this plea, if it be that the land or any of it actually received by this company is applicable to expenses of operation, or would otherwise go to a reduction of rates to be charged the people, on passenger or freight transportation, it can be shown in support of such rates, should it become necessary to do so.

The same may be said as to the lands granted to the State by the act of congress of May 17, 1856, which the sixteenth section of the company's charter act provides the company shall have.

The demurrer of the State, in so far as it is applicable to the third plea, should have been overruled.

2. The fourth plea sets up a series of facts, which are claimed to constitute a defence to the action, and are alleged to have been presented to the commissioners and the board of revisers as reasons against the enforcement of their rates. They are:

(a) The railroad was completed in April, 1883, when the company began to operate it, and is 161 miles long. Its construction and equipment cost \$3,345,080. That the commissioners' rates are very much less than those heretofore charged by the company, and the company has failed to realize from the operation of its road, upon the latter charges, enough to meet the necessary expenses of the operation and ownership of the road; and the operation of the road from April, 1883, has been prudent, economical, and judicious, and with an eye single to the increase of income and decrease of expenditures.

**Facts
alleged to
constitute
defence.**

(b) That from April, 1883, to June 30, 1887, four and one-fourth years, the gross earnings exceeded the bare expenses of operation (including taxes) only by \$52,662.50, or 36 16-1700 of 1 per cent. per annum upon the actual cost of the road and its equipment; and the cost of the actual and necessary repairs and current employment largely exceeded said ostensible excess of \$52,662.50.

(c) For the year ending June 30, 1887, the excess of the operating expenses (not including taxes) over the income from all sources was \$4,234.52. The taxes were \$17,069.15, and with said excess aggregate \$21,303.67.

(d) For the period from June 30, 1887, to March 1, 1881 (and thereafter in like proportion), the excess of the operating expenses of the road over income from all sources has been \$15,834.87.

(e) That West Florida, through which the road runs, has only eight inhabitants to the square mile. That along the entire route from Pensacola, a city of 12,000 or 15,000 inhabitants, to River Junction, there are but two towns exceeding 1,000 inhabitants, and but three which exceed 250 inhabitants. The main staple for shipment is lumber, for the transportation of which numerous streams vie with the company at a rate much cheaper than it can afford.

(f) That the rates of freight and passage over the line of the road from points off to points on, and from points on to points off, are fixed and determined by competition upon a basis much lower than those fixed by the commissioners, and cannot be increased by the defendant.

(g) That at the beginning of the partial operation of the road, viz., from August 5, 1883, to February 1, 1885, the local rates were as follows :

Agents, first class rates, $4\frac{1}{2}$ cents per mile.

Agents, second class rates, $3\frac{1}{2}$ cents per mile.

Conductors, first class rates, 5 cents per mile.

Conductors, second class, 4 cents per mile.

Round trip rates 7 cents per mile.

During the existence of these rates nearly 90 per cent. of the passengers travelled on the $3\frac{1}{2}$ cent rate. The above rates were found to be entirely unremunerative, and the $3\frac{1}{2}$ and 4 cent rates were abolished on February 1, 1885. That this change did not result, and has not resulted, in the decrease in the number of local passengers, but immediately upon such change the gross income from the transportation of such passengers, which had prior thereto been not only unremunerative, but practically of unvarying amount, increased 15 per cent. for the ensuing year, which increase has been maintained with uniformity since that time.

(h) That at the beginning of the completed operation of the road defendant established rates of local freight at a rate deemed by it to be remunerative, which continued in force till January 1, 1885, when, to induce transportation, defendant reduced the rates upon the commodities constituting more than three-fourths of the freight, to a point much below the former rates, although above the rates fixed by the commissioners; but this reduction did not cause, and has not caused, any increase in the quantity of freight transported, or in the gross income therefrom, but the income decreased, and has remained less than it was before the reduction.

There are also assertions in the plea to the effect that "in all human probability" the deficits indicated in the first four paragraphs of the plea will continue for some years to come, as the

completion of roads having a shorter distance to operate between desirable points to be reached over defendant's road must and will prevent, in a large measure, any increase of through business or through business rates; and that the sparseness of the population and the meagerness of the products to be shipped by rail through the country through which the road runs, prevents, and will prevent, any increase in the value of the local business which might otherwise result from a reduced rate; and that a reduction of rates to those prescribed by the commissioners would compel defendant to forego any possibility of earning any interest on its investment, or any income from the operation of the road, and to continue the operation of it at an irretrievable loss, and render the line valueless for purposes of either operation or sale. These assertions are, however, rather the expression of opinions and apprehensions than facts admitted by the demurrer.

An admission by the State, or even by the commissioners, of the facts stated in this plea, is not an admission that the rates prescribed by the latter would not be remunerative. As was said by Judge WOODS, in the Tilley case, a reduction of rates is not always followed by a reduction of income, either gross or net. It can soon be settled which is right—the railroad company's officers or the railroad commission—in their view of the effect of the latter's tariff rates, by allowing the tariff to go into operation. 4 Woods, 452. A different management from that now controlling the appellant company might agree with the railroad commissioners, and adopt the tariff proposed by them, and yet another management might put in force rates distinct from either. The railroad commissioners must be presumed by the courts to understand railroad business, and to have in careful keeping the real interests of the railroads.

Reduced
rate not
necessarily
unremunera-
tive.

The intricacy of the subject of tariff and freight rates, the importance of the interests involved, and the difficulty of courts dealing efficiently with the matter in ordinary suits, even considering merely the time that would be consumed, has led to the establishment and maintenance of commissioners at the expense of the people. Their mission is to do justice as between the people and the railroad companies. They are not expected or presumed to place any restrictions upon a railroad, except those clearly necessary to effect the purposes of the constitution and the legislation under it. 70 Ga. 694. Where a tariff has been fixed by a commission it must be tested by experiment, unless it is shown or appears upon its face to be destructive of the railroad's interests. Neither the courts nor the railroad company can substitute its judgment for that of the commission, where there is room for difference of intelligent opinion. A different rule from this would install a presumption that the commission

neither knew their duty, nor desired to do it. Like all officers, they will be presumed to know and do their duty until the contrary is shown. Under circumstances which admit of no difference of opinion, or when it is admitted upon the record, as in the case of the third plea considered above, that the commission rates are unremunerative, their enforcement becomes a wrong, for which there may be no remedy but in the courts; but, where there is room for honest judgment as to whether or not such rates will prove remunerative, the judiciary should not interfere. *Avery v. Fox*, 1 Abb. (U. S.) 246.

When the above case of *Chicago, B. & Q. R. Co. v. Dey* came again before Judge BREWER last February, upon supplemental bill, the facts, as presented by the new pleading, showed that the effect of the tariff of rates fixed by the commissioners was doubtful, with a seeming probability, however, of their proving compensatory, and the amount of business to be effected was small, he held that the result should be left to the test of experience, and refused a preliminary injunction, and dissolved the restraining order previously made. 38 Fed. Rep. 656.

This is not a good plea.

3. The first plea is that the rate charged for the transportation of the passengers was a reasonable, and the second plea, that the one fixed by the commission was less than a reasonable rate.

These pleas speak, not as to the unreasonableness of the tariffs prescribed by the commissioners, considered as an entirety, but simply as to the passenger rates. The case of *State v. Chicago, M. & St. P. R. Co.*, *supra*, decided by the supreme court of Minnesota, is somewhat in point as applicable to these pleas.

Court has
no power to
fix rate.

As between a railroad company and a passenger, or the former and the State, we do not think that the company can question before the courts a particular tariff, on the simple ground that it is in its judgment unreasonable, or can invoke the interference of the court as against the judgment of the commissioners that it is unreasonable. The courts have no power to make freight and passenger tariffs. In *Chicago, B. & Q. R. Co. v. Dey*, 38 Fed. Rep. 656, Judge BREWER in speaking of his former decision in the same case, says: "In the injunction which was issued there was no assumption of power to prescribe rates, and no pretence of interfering with the commissioners in the discharge of any duties imposed on them by the statute."

4. In view of the conclusions announced as to the third plea, the judgment in each of the cases mentioned in the first paragraph of this opinion must be reversed, and a new trial granted.

Judgments will be entered accordingly.

Railroad Commission—Suit Against.—In *Chicago & Northwestern R. Co. v.*

Dey, 35 Fed. Rep. 866. it was held that where a railroad chartered in one State, brings a suit against the commissioners of another State to prevent them from putting in force a schedule of rates which they have adopted, the action is not a suit against the State for which the officers act within the meaning of the Eleventh Amendment to the Constitution of the United States, which provides that the courts of the United States shall not have jurisdiction of suits against the State by citizens of another State. It was also *held* that the provisions of the Iowa statute authorizing railroad commissioners to make and put in effect a schedule of rates, are not unconstitutional as an attempt to delegate the legislative power. Nor is the statute open to the objection that it is penal and imposes enormous penalties without clearly defining the offence of charging unjust and unreasonable rates: a schedule of rates when adopted by the railway commissioners, is to be regarded as the test of the reasonableness of the charges. The court also declared that the authority conferred upon the railroad commissioners to establish schedules of rates and making such schedule so established *prima facie* evidence in all suits, is not an infringement of the right secured by the constitutional provision that no person should be deprived of property without due process of law. It was also held that the provisions of the statute imposing a fine of from \$1,000 to \$5,000 for the first violation thereof, and from \$5,000 to \$10,000 for each subsequent violation, are not invalid as imposing excessive penalties. It was further *held* that where a schedule of railroad rates has been adopted by railroad commissioners which fixes the charges so low that they will not pay the cost of necessary skilled servants, the cost of the best appliances and keeping the same in proper condition, interest on bonds, and then leave something for dividends, a court of equity should restrain its enforcement, and the fact that the bill for injunction is brought by a foreign corporation, which is permitted simply as an act of grace to do business in the State, and which may retire when the business ceases to be profitable, is no defence to the bill, nor is the fact that the railroad is operated through other States, where there are no fixed rates and where it may make profit. The court declared that, in considering the application for an injunction, it could not take into consideration the fact that a reduction of rates might increase the volume of business.

The court granted an order to continue a preliminary injunction until the final hearing, it having been shown that great hardship would result to the complainant from the enforcement of the schedule of rates, and that the law provided no adequate remedy for the imposition of the unreasonable charge.

At a later stage of this case (38 Fed. Rep. 656) the court *held* that as the evidence as to the probability of loss was so conflicting that the effect of the rates was doubtful, and largely dependent on future developments, and only about 4 per cent. of the local traffic would be affected by the reduced rate, relief could not be granted until experience has demonstrated that the rates are not compensatory. It was also held that it was not a violation of a temporary injunction against putting in force a schedule of rates on the ground that they were unreasonably low, for the commissioners to make another schedule after investigating a complaint filed against rates charged by a railroad company, although the purpose of those making the complaint was to evade the injunction, and their conduct in attempting to procure a favorable decision on the complaint was improper, as the duty of the commissioners under the statute was to hear the complaint and establish proper rates.

In *Chicago, St. Paul, Minneapolis & Omaha R. Co. v. Becker*, 35 Fed. Rep. 883, overruling 32 Fed. Rep. 849, it was *held*, following the decision in *Chicago & Northwestern R. Co. v. Dey*, that an action might be maintained against the railroad and warehouse commission of the State of Minnesota by a railroad company chartered in another State to enjoin the commissioners from putting in force a schedule of rates, such action not being a suit against the State within the meaning of the federal constitution. It was also *held* that a schedule of rates for switching cars in the city, which fixes the compensation at less than the actual cost of the work, should not be enforced.

STATE *ex rel.* RAILROAD AND WAREHOUSE COMMISSION

v.

CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA R. CO.

(Minnesota Supreme Court, March 18, 1889.)

Railroad Commission—Freight Charges—Interstate Commerce.—The railroad and warehouse commission of this State has no authority to prescribe rates for transportation by common carriers in another State. It cannot fix the rates for carriage between two points within this State, over a route extending across a neighboring State. Such power is vested exclusively in Congress.

PETITION by the State on the relation of the railroad and warehouse commission of the State of Minnesota to compel the Chicago, St. Paul, Minneapolis & Omaha Railway to comply with an order made by commission.

Moses E. Clapp Attorney General, for relator.

J. H. Howe for respondent.

DICKINSON, J.—This is a proceeding by *mandamus* to compel the respondent to comply with an order of the railroad and warehouse commission of this State prescribing rates for the transportation of freight over the respondent's line of road from the city of Duluth to the city of Mankato, both of which are within this State. The only question now presented for decision is as to the jurisdiction of our railroad and warehouse commission to make this order, in view of the circumstances to which we now refer. The line of railroad operated by the respondent, and over which its business of transportation between the cities above named is carried on, is as follows: That part of the line within the city of Duluth, and which extends to the boundary line between Minnesota and Wisconsin, is owned by the Superior Short-Line Railway Company of Minnesota, a corporation of this State. Connecting with this at the boundary line, and extending into the village of Superior, in Wisconsin, is a road owned by the Superior Short-Line Railway Company, incorporated under the laws of the latter State. Connecting with this, at the village of Superior, commences the railroad of this respondent, which runs from thence to the city of Hudson in Wisconsin, a distance of 148 miles. At that point it crosses the boundary line into Minnesota, and from that point, by way of St. Paul, the line runs within this State, 105 miles, to

Statement
of case.

Mankato and beyond. The two short-line railways above mentioned are operated by this respondent as a part of its line of road, and we attach no importance to the fact that they are owned by other corporations. So far as it concerns the question here involved, the entire line from Duluth to Mankato is to be deemed as under the control of this respondent, and as though the whole were a part of its own line of road.

By section 8, article 1, constitution United States, Congress is empowered "to regulate commerce with foreign nations, and among the several States." The transportation of property by a common carrier, including the rates to be charged therefor, is embraced within the meaning of the word "commerce," as here used. *Gibbons v. Ogden*, 9 Wheat. 1; *Case of State Freight Tax*, 15 Wall. 232; *Lord v. Steamship Co.*, 102 U. S. 541; *Wabash etc. R. Co. v. Illinois*, 118 U. S. 557; 26 Am. & Eng. R. R. Cas. 1; *Philadelphia etc. Co. v. Pennsylvania*, 122 U. S. 326; *Fargo v. Michigan*, 121 U. S. 230; 31 Am. & Eng. R. R. Cas. 452; *Carton v. Illinois Cent. R. Co.*, 59 Iowa, 148; 6 Am. & Eng. R. R. Cas. 305. Since the decision in *Wabash etc. R. Co. v. Illinois*, 118 U. S. 557, 26 Am. & Eng. R. R. Cas. 1, it must be regarded as settled, whatever doubts may have been previously entertained, that the regulation, as by prescribing rates, of such transportation as is to be deemed interstate as distinguished from wholly domestic carriage is exclusively given to congress. The only question upon which there can be any doubt is whether the transportation to which this order of the commission relates is to be deemed commerce or transportation between different States, within the meaning of the constitutional provision above quoted, or as being in its nature merely domestic commerce or transportation, to be governed wholly by our State laws, and over which congress has no control. The order prescribing rates, and to enforce the observance of which is the object of this proceeding, applies to the entire route from Duluth to Mankato, a large part of which—indeed, the greater part of which—lies beyond the boundaries of our State, and within the territory of another sovereignty. These rates are for the continuous carriage of freight over the entire route, including the transit of 148 miles through the State of Wisconsin. The order is as applicable to that part of the line as to that which is within our own State, and can only be sustained upon the theory that the railroad and warehouse commission of the State of Minnesota has authority to determine what charges may be made for the transportation of freight by a common carrier through the State of Wisconsin, provided only that the carrier receives the property within this State, and is to carry it through the foreign State to a destination within our own borders.

**Exclusive
power of
congress to
regulate
interstate
commerce.**

In view of the above decisions of the supreme court of the United States, that the transportation of freight by a common carrier, apart from considerations of contract concerning the property as between the shipper and the consignee, is a subject of "commerce," to which the constitution applies, it is not a matter of controlling importance that the consignor and consignee, or place of shipment and destination, be within the same State, if the transportation is through a foreign State.

Assuming that the constitution places within the exclusive control of congress the subject of transportation among the several States, let us suppose that a shipment is made from Duluth to Winona—both cities being within our State, but upon the borders of Wisconsin—by a route wholly within the latter State, excepting the inconsiderable distance of the depot grounds in those cities from the State line. Can it be said that this carriage of perhaps 200 miles through the State of Wisconsin, and of a mile or two within our own borders, is domestic transportation and commerce, as distinguished from that which, under the constitution, is to be deemed as being "among the several States?" The constitution, as interpreted by the court whose decisions upon this subject are final, has placed under the exclusive regulation of congress the subject of transportation among the States, so far, among other things, as relates to the matter of charges, in order that it may be protected from conflicting and adversely discriminating State legislation. See authorities above cited. Is not a case such as we have supposed, or the case now before us, transportation among the States, within this purpose of the constitution, as really as would be a shipment and transportation of goods from New York, Chicago, or Milwaukee to Minnesota, as to which unquestionably, under the decision above cited, congress, and not the several States, would have the power to regulate? We are unable to state any principle which supports the relator's claim of jurisdiction to determine what charges may be made for the transportation of freight through the State of Wisconsin. Whether the result would have been different if the order had prescribed rates only with respect to so much of the route as is within our own State we do not decide. The mere fact that Duluth and Mankato are both in this State, and that a part of the line of road of this respondent is also here, and operated under our law, cannot authorize our State authorities to regulate the operations of the 148 miles of road which is wholly within the State of Wisconsin, and which there exists, and is managed, of course, under the laws of that State, subject to such limitations as the national constitution may impose. The order in question applies to all freight transported over this route from Duluth to Mankato. But it appears that in the usual course of

business the respondent receives freight at the docks in Duluth destined for the several points on its road, both in Wisconsin and in this State, which had been received there from vessels navigating the great lakes, and which, as is to be inferred, must be classed as interstate commerce in any meaning of that term. Of course, as to such transportation our commission has not authority to prescribe rates under the decisions above cited. There might perhaps be distinguished from this case the case of a Minnesota carrier engaged only in carrying between points within this State, but whose route incidentally at some point, and for an inconsiderable distance, should cross the line of the State. Whether or not the transportation in such a case might be deemed to be substantially domestic, and not embracing an important element of foreign transit, we do not decide. This is not such a case. This line within Wisconsin, to which this order is applicable, was operated not merely for transportation between points in Minnesota, but was doing the ordinary business of a common carrier within the State of Wisconsin.

The question under consideration has not come before the supreme court of the United States in the form here presented; but it seems to us that that court has so determined the construction and effect of the commerce clause in the constitution that, following its decisions, as we are bound to do in such cases, the result already indicated cannot be avoided. We need not again refer to the many decisions, some of which have been cited, which leave no doubt that transportation is commerce within the meaning of the constitution, and that the authority of congress is exclusive as respects the regulation of rates for interstate commerce.

**Examina-
tion of
authorities.**

In *Lord v. Goodall, N. & P. Steamship Co.*, 102 U. S., 541, the question presented for decision was whether congress had the power to regulate the liability (to the owners of goods lost in the course of transportation) of the owners of vessels engaged only in transportation between different ports in the same State (California), the voyage between such ports being in part upon the high seas, and out of the limits of the State. The court recognized the fact that congress had no power to thus interfere with the exclusively internal commerce of a State, and that the law of congress (restricting the common-law liability of carriers) could be sustained in its application to this case, only in case the transportation in question should be deemed to be within the clause of the constitution empowering congress "to regulate commerce with foreign nations and among the several States." It was decided that such transportation was included in "commerce with foreign nations," a matter of "external concern," as respected the State of California, and subject to the regulating

power of congress. If such transportation from San Francisco to San Diego, in the same State, was "foreign" commerce (transportation) within the meaning of the constitution, because the voyage was for the most part upon the high seas, the common highway of nations, is not the transportation from Duluth to Mankato, by a route which for the most part is wholly within the territory of Wisconsin, commerce (transportation) "among the several States?" Has not the State of Wisconsin at least as much interest and as large a jurisdiction concerning the transit of goods by carrier across its territory as have the nations of the world, including our own, in the voyage merely from port to port in the State of California? How can the one be deemed foreign and the other exclusively internal, as respects the State of Minnesota? We are unable to make any distinction, and it seems to us that our decisions must be controlled by that above cited. *Pacific Coast Steamship Co. v. Board of Railroad Commissioners*, 9 Sawy. 253, was like that last cited, except that the question related to the power of the State authorities of California to regulate rates of transportation upon steam vessels between various ports in that State. That authority was denied for the reason that it was not domestic commerce, the vessels in the course of the voyage going out to sea more than a league from land. FIELD, J., wrote the opinion of the circuit court.

A case closely analogous to that under consideration was very recently decided by the supreme court of South Carolina, in *Sternberger v. Cape Fear & Y. V. R. Co.*, 35 Am. & Eng. R. R. Cas. 693. The defendant was charged with violating the statute of that State which forbids a higher charge for a shorter than for a longer carriage. The property had been shipped from Charleston to Tatum—both places being within that State. The course of transit from Charleston was, first, over two railroads wholly within the State; then to a point in North Carolina over a road operated in both States; then for some distance within North Carolina, over a road wholly within that State; then it was received in North Carolina by the defendant road, which was operated in both States, and transported to its destination at Tatum. The charge exacted for the entire distance was \$4.40, while the freight to a point six miles further would have been only \$4. It was held that the railroad commission of South Carolina had no jurisdiction to fix rates for such transportation; nor does the decision seem to rest entirely upon the fact that one of the roads in this route was wholly in North Carolina. That fact, as we think, should not have affected the result.

The interstate commerce commission has recently (November, 1888) ruled upon the question here presented, holding that commerce between points in the same State, but which, in being carried from one place to the other, passes through another State,

is interstate commerce, subject to congressional regulation. *New Orleans Cotton Exchange v. Cincinnati, N. O. & T. P. R. Co.*, 2 Interst. Comm. R. 375. We are aware that the supreme court of Pennsylvania has held to the contrary. *Com. v. Lehigh V. R. Co.*, 17 Atl. Rep. 179. If those cases were wholly analogous to that before us, that court has not regarded the decision of the court of last resort in such cases, in *Lord v. Steamship Co.*, *supra*, as having the effect which we think must be accorded to it.

Our conclusion is that the commission had no jurisdiction to prescribe rates for transportation through the State of Wisconsin, and the writ must be quashed. Ordered accordingly.

Railroad Commission—Establishment of Freight Charges—Appeal.—In Minnesota the supreme court have construed the statute of 1887, creating the railroad and warehouse commission and defining its duties, as not authorizing an appeal to the district court from an order of the commission prescribing the rates to be charged by common carriers. *Railway Transfer Co. v. Railroad and Warehouse Commission (Minn.)*, 39 N. W. Rep. 150.

Authority and Jurisdiction of State Railroad Commissions.—See *Board of Railroad Commissioners v. Oregon R. & N. Co.*, 35 Am. & Eng. R. R. Cas. 542, note, 550; *State v. Fremont, E. & M. V. R. Co.*, 32 Ib. 426, note, 437.

DELAWARE, LACKAWANNA AND WESTERN R. CO.

v.

CENTRAL STOCK YARD AND TRANSIT CO.

(*New Jersey Court of Chancery, February 5, 1889.*)

Corporations—Injunction—Refusal to Perform Duty—Evidence.—Where one corporation seeks judicial redress against another corporation, on the ground that the other has refused to give a service, or to perform a duty which it owes, the complaining corporation, to succeed, must show, affirmatively, that the service or duty which it claims exists by force of a statute, or a contract, or a usage having the force of law.

Same—Usage—Contract—Statute.—Unless a duty has been created against a corporation by usage, or by contract, or by Statute, the courts cannot be called on to give it effect.

Same—Chancery Jurisdiction.—A court of chancery is not, any more than is a court of law, clothed with legislative power. It may, in cases where no adequate remedy at law exists, enforce, in its own appropriate way, the specific performance of an existing legal obligation arising out of contract, law, or usage, but it cannot create the obligation.

Same—Stock Yard Company—Warehouseman.—The business of a stock yard corporation, except in the character of the property which is the subject of bailment, corresponds in many respects with the business of warehousemen.

Same—Duty of Warehouseman.—A warehouseman cannot have the possession of another man's property, with its accompanying duties and responsibilities, forced upon him against his will.

Same—Legislative Authority.—The legislature has power to declare what service warehousemen shall render to the public, and to fix the compensation that may be demanded for such service, but until such power is exercised, warehousemen are at liberty to use their warehouses as they please.

Same—Charter—Construction of Condition.—The presence in the defendant's charter of a provision, authorizing them to make contracts with the several railroad companies having a terminus in Hudson county, for the transportation and delivery of live stock at their yards, shows clearly that the legislature did not intend that the defendants should be subject to any duty to railroad companies, in that respect, except such as they should voluntarily take upon themselves by contract.

Same—Irreparable Damage—Legal Right.—To justify the interference of a court of equity on the ground that its interference is necessary to prevent irreparable damage, the complainant's legal right must be clear. There can be no damage, irreparable or otherwise, where there is no violation of a right.

Same—Violation of Legal Right.—Where the only ground laid to support the jurisdiction of a court of equity is that the defendant is violating a legal right of the complainant to his irreparable injury, the complainant, to be entitled to the aid of the court, must show that his adversary's conduct is unconscientious.

ON final hearing on bill, answer and proofs.

Flavel McGee and Joseph D. Bedle for complainants.

Leon Abbett for defendants.

VAN FLEET, V. C.—The complainants allege that the defendants have refused to perform a legal duty which the defendants owe to them, and they bring this suit to procure a

Facts. decree compelling the performance of such duty.

The complainants have control of a continuous line of railway from Hoboken to Buffalo, with connections at Buffalo extending to Chicago and other points in the west. They do a very large business in the transportation of live stock, their income for carrying this kind of freight exceeding a half a million of dollars a year. The defendants are a stock yard corporation, having yards and other facilities at the foot of Sixth street in Jersey City, for the safe-keeping, feeding, sale and slaughter of live stock. Their yards front on the Hudson river, where wharves have been built for the reception of live stock carried to the yards by vessel. The eastern terminus of the complainant's road is at Hoboken, distant about 1,600 feet from the defendants' yards. There is no connection between the complainants' road and the defendants' yards by railroad track or other physical means. There are three different ways or means by which live stock may be taken to the defendants' yards: First, it may be driven there over the public highway; second, both the Erie Railway Company and the Pennsylvania Railroad Company have laid tracks from the line of their roads to the defendants' yards, over which cars containing live stock are run to the yards; and third, live stock may be carried to the defendants' yards by vessel, and delivered on their wharf. For more than two years prior to the 15th of July, 1887, nearly all the cattle, calves and sheep carried by the complainants to the eastern terminus of their road were transferred to the defendants' yard, in the complainants' cars, over the track of the Erie Railway Company; the

cars being switched from the complainants' road to the Erie track at the junction of the two tracks. On the date last named the Erie Company increased their charge for this service from \$2.50 and \$3 a car to \$5 a car. The complainants, being unwilling to pay the increased rate of charge, made an arrangement for the same service with the Susquehanna Railroad Company, who were at that time using the track of the Pennsylvania Railroad running to the defendants' yards. After the lapse of about a month, the Pennsylvania Company refused to allow the complainants to have the use of their track. The complainants then applied to the defendants to either send their boats to Hoboken for such stock as the complainants might desire to have yarded at the defendants' yard, or to allow the complainants to send, in their own boats, to the defendants' yards such stock as the complainants might desire to have yarded there. The defendants refused to do either,—they refused to send their boats for complainants' stock, or to receive stock brought to their wharf by the complainants' boats. The reason the defendants refused to comply with the complainants' request was because the complainants had, prior to the time the request was made, refused to conduct their live stock business in such manner that all cattle, calves and sheep which they carried to Hoboken should be yarded at the defendants' yards. Prior to the 14th of June, 1887, nearly all the cattle, calves and sheep carried by the complainants to Hoboken had either been yarded at the defendants' yards, or the same yard charges paid to the defendants on them that would have been payable if they had, in fact, been yarded there. About the date last named the complainants made an arrangement by which the live stock carried over their road, for delivery at a stock yard at Forty-fifth street, on East river, should be transferred by their own boats directly from Hoboken to the point of delivery. This arrangement diverted from the defendants' yards all the stock so transferred, and deprived them of the profit which they would have otherwise received from it. The diversion of this business was regarded by the defendants as a hostile act, and they at once assumed an unfriendly attitude towards the complainants. They at once gave notice, by their acts, that they intended to stand upon their strict legal rights, and to yield nothing to the complainants which the law did not give. This was, unquestionably, the origin of the present controversy. Immediately after the complainants were notified that the defendants would neither send for such stock as the complainants desired to have yarded in the defendants' yards, nor allow it to be brought to their wharf in the complainants' own boats, the complainants filed the bill in this case, asking for an injunction compelling the defendants to receive live stock from them. A preliminary injunction was refused (*Delaware, L. & W. R. Co. v. Central Stock Yard & T.*

Co., 43 N. J. Eq. 71), and this ruling was affirmed on appeal by a divided court (43 N. J. Eq. 605).

The case has been heard on final hearing, and is now to be decided on its merits. The claim of the complainants is that the defendants are under a legal obligation to take from them just such live stock as they may desire to have yarded at the defendants' yards, whether the same be sent to the defendants on foot, by rail, or by boat, and also that it is the duty of this court to enforce this obligation by injunction. The proofs show that the defendants have never refused to receive stock from the complainants when the same was sent on foot or delivered by rail. At present, however, the complainants cannot have stock carried to the defendants' yards by rail. They have no track of their own, and they have been denied the use of the Pennsylvania track, and have ceased to use that of the Erie, because they are not willing to pay the rate which they have been notified will be charged for its use. But the particular way or method of delivery is rendered wholly immaterial by the defendants' answer. They deny that they are under any duty or obligation to the complainants, let the method of delivery be what it may, to take live stock from them. The following are the pertinent averments of their answer: "These defendants have and do refuse to receive, except under the command of an injunction, any live stock transported over the road of the complainants, and consigned to shippers doing business at the defendants' yards, so long as the complainants persist in diverting from the defendants' yards at least nine-tenths of the complainants' cattle business, and they are advised and insist that they have a right so to do." Again: "These defendants admit that it is their intention to prevent the transportation to their yards of any live stock coming over the complainants' railroad, unless the complainants are willing to give to the defendants all their business, the same as other railroads do, and they are advised and insist that they have a right so to do." Further: "These defendants also say that they never have made, and do not intend to make, any objection to yarding live stock which has been delivered to consignees on the line of complainants' road, and driven to their yards."

From these averments it will be seen that the material matter in dispute is not what right a natural person may have to live stock yarded at the defendants' yards, nor what may be the right of the general public in that regard, but whether the complainants have such right. This is not a suit by the attorney general asking for the protection or vindication of a public right, nor a suit by a natural person asking to be protected against a special and peculiar injury which he must suffer if deprived of

**Right of
public to
stock yard
facilities not
involved.**

a right which he, in common with all the citizens of the State, is entitled to enjoy, but it is a suit by a corporation to enforce a right which it says belongs to it as a body corporate.

The complainants are the mere creature of legislative power, and have no capacity or rights, and can exercise no powers, except such as have been given to them by their creator. They exist by force of legislative authority, and have no rights except such as the legislature has given to them, or as they have acquired by contract, or as have arisen from custom and usage, so long and uniformly pursued as to have become a part of our general system of laws. Where, in a case like the present, one corporation seeks judicial redress against another, on the ground that the other has refused to give a service or to perform a duty which it owes, the complaining corporation, to succeed, must show, affirmatively and clearly, that the service or duty which it claims exists by force of a statute, or a contract, or a usage having the force of law.

Right to
exact
performance
of duties
between
corporations

This, I understand, to be the principle on which the decision in the Express cases, 117 U. S. 1, 601, rests. These cases, it will be remembered, arose out of the refusal of certain railroad corporations to give equal facilities, on like terms, to each express company asking to be permitted to do an express business on their roads. Under the lead of Mr. Justice MILLER of the supreme court of the United States, it was held, both on interlocutory application and on final hearing, in several cases decided by the circuit court of the United States, in two or three different circuits, that a railroad corporation was under a legal duty, in the absence of either statutory regulation or contract obligation, to furnish to each express company desiring to do business on its road the same facilities for the doing of such business which it either provided for itself, or furnished to any other express company, and also that a court of equity might, in the rightful exercise of its general jurisdiction, compel the performance of this duty by injunction. These decisions were put mainly on the ground that, as railroads were public highways, and the express business had become a well-recognized instrument of commerce, it was necessary, in order that the public might have the full benefit of the general principle making it the duty of a common carrier who carries on his business on the public highways to extend equal privileges and accommodations to all, on equal terms as to compensation, that this principle should be applied in defining the duty of a railroad company to an express company. Decrees were accordingly made, compelling the defendant railroad company in each case to furnish to the complaining express company the same facilities, on both passenger and freight trains, for the

Express
cases
examined.

transaction of an express business on its road, that it provided for itself, or furnished to any other express company. Several of the cases in which this doctrine was enforced will be found collected in the notes to 1 Wood, Ry. Law, 587. Three of these cases were, after final hearing, carried to the supreme court of the United States (Express Cases, *supra*), and there the decrees made below were reversed, and the bills of complaint dismissed. That court held that a duty, of the kind the complainants were seeking to have imposed upon the defendants, could only be created in three ways, namely, by usage, or by contract, or by statute; and that, inasmuch as the complainants could point neither to a usage nor to a contract nor to a statute which created the duty the courts below had attempted to enforce, it must be declared that no such duty existed. The court said the circuit courts had attempted to make such an arrangement for the business intercourse of the litigants as, in the opinion of the court, the litigants ought to have made for themselves, but that was a thing which was beyond judicial power. Said Chief Justice WAITE, speaking for all the members of the court who heard the cases, except Justices MILLER and FIELD: "The regulation of matters of this kind is legislative in its character, not judicial. To what extent it must come, if it comes at all, from congress, and to what extent it may come from the States, are questions we do not now undertake to decide, but that it must come, when it does come, from some source of legislative power, we do not doubt. The legislature may impose a duty, and when imposed it will, if necessary, be enforced by the courts, but, unless a duty has been created either by usage, or by contract, or by statute, the courts cannot be called on to give it effect."

Substantially the same principle had previously been enunciated in the decision of *Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co.*, 110 U. S. 667, 16 Am. & Eng. R. R. Cas. 57. The names of three railroad corporations appear in this case, namely, the Atchison, Topeka & Santa Fe Railroad Company, and the Denver & New Orleans Railroad Company, and the Denver & Rio Grande Railroad Company. For brevity, the first will hereafter be called the "Atchison Company," the second the "New Orleans Company," and the third the "Rio Grande Company." The Atchison Company controlled a line of railroad extending from Kansas City, Mo., to Pueblo, Colo., and the New Orleans Company and Rio Grande Company each owned a railroad extending from Pueblo to Denver. The two latter ran nearly parallel, and were operated as rival roads. The Atchison and Rio Grande Companies, prior to the completion of the New Orleans Company, had made an agreement under which a through business was done over the whole of their lines from Kansas City to

**Atchison, T.
& S. F. R.
Co. v. Den-
ver & N. O.
R. Co.**

Denver. While this arrangement was in force, the New Orleans Company connected its tracks with those of the Atchison Company at Pueblo, at a point distant about three quarters of a mile from the depot in Pueblo which the Atchison and Rio Grande Companies had established there for their joint accommodation. The New Orleans Company erected, at the point where its tracks intersected those of the Atchison Company, platforms and other conveniences for the transfer of passengers and freight from one road to the other, and then demanded that the Atchison Company should stop its trains at the junction of the two roads, and furnish it there with the same facilities for doing a connected through business that it furnished to its competitor, and for the same compensation that its competitor paid. The Atchison Company refused to comply with this demand, and a bill in equity was then filed. On the final hearing of the cause, the circuit court of the United States made a decree placing the New Orleans Company, at the junction it had made with the Atchison Company, on an equal footing, as to the interchange of business, with the Rio Grande Company, both as to facilities and prices, except in respect to the issue of through bills of lading, through checks for baggage, through tickets, and the interchange of cars. Three provisions of the constitution of Colorado were supposed, in their joint effect, to lay a foundation for this decree. These provisions declare: First, that all railroads shall be public highways, and all railroad companies shall be common carriers; second, that every railroad company shall have the right, with its road, to intersect, connect with, or cross any other railroad; and, third, that all individuals, associations, and corporations shall have equal rights to have persons and property transported over any railroad in this State, and no undue or unreasonable discrimination shall be made, in charges or facilities, for the transportation of freight or passengers within this State. On appeal to the supreme court of the United States, it was decided unanimously that the decree made below was without warrant in law. The reasoning of the court, in part, was that the right conferred by the constitution, of connecting the tracks of one road with those of another, did not confer a right upon either corporation to compel the other to form a business connection for the transaction of a through business, but that the right was limited to the formation of a mechanical union, to connect one physical structure with the other. The court on this point, said; "The railroad companies are not to be connected, but their roads. A connection of roads may make a connection in business convenient and desirable, but the one does not necessarily carry with it the other." And as to the claim that the Atchison Company had violated the constitutional prohibition against undue or unreasonable discrimination, in refusing to interchange business with the New Orleans Company, the court said

that, in the absence of statutory direction or contract obligation creating such duty, it did not exist; and also that it was not within the power of a court of equity to compel a railroad company, having power to regulate the running of its trains as to time, and to locate its own stopping places, to stop its trains and interchange business with another company, at such point as the other company might select for the formation of a junction between the two roads. To invest any court with power of this kind would require it to exercise functions not at all judicial in their character, but such as are, in some States, confided to a special and independent agency of government. The jurisdiction which a court of equity may rightfully exercise, in a case like the one now under consideration, was defined by Chief Justice WAITE in the case last cited, as follows: "A court of chancery is not, any more than is a court of law, clothed with legislative power. It may (in cases where no adequate remedy at law exists) enforce, in its own appropriate way, the specific performance of any existing legal obligation arising out of contract, law, or usage, but it cannot create the obligation."

The complainants do not ground their claim to judicial aid on either contract or usage. No contract relations existed between the parties at the time this suit was brought, and it is neither averred nor proved that a custom or usage had existed for so long a time prior to the institution of this suit as to give it the force of law by which the duty in question was imposed upon the defendants. The only foundation, therefore, which the complainant's case can have, is the law, and, if it is found that that does not impose the duty claimed, then it must be declared that no such duty exists. It does not exist, so far as I can discover, by force of any general rule of law. In the opinion written when the application for a preliminary injunction in this case was decided, it was said that the complainants stand, in respect to their legal duties, in a position very similar to that which a common carrier occupies, bound to serve all who have a right to demand their service, to the best of their ability, and on equal terms as to compensation. *Delaware, L. & W. R. Co. v. Central Stockyard & T. Co.*, 43 N. J. Eq. 74. This opinion, as may be seen at a glance, was based on an assumption that there was a strong and close similitude between a railroad or canal company, in their character as a common carrier, and the defendants, both in respect to the powers which each might exercise, and the duties which each were bound to perform for the public. But it is now entirely clear that such is not the fact. Between the defendants and a railroad or canal company there is not the slightest analogy. There is not a single respect in which they bear the least resemblance to each other. Railroads and

Stock yard
companies
not bound
by rules
similar to
rules bind-
ing common
carriers.

canals are public highways. They are uniformly made so by constitution, general statute, or special provision of their charter, and the corporations authorized to construct them are, because their works, when constructed, are to be subject to public use as highways, given power to exercise the right of eminent domain, and for this reason such works are regarded as public highways, and each member of the public has in consequence an equal right to their use, upon the payment of such compensation as the legislature has seen fit to prescribe. But the defendants stand in no such relation to the public. No privilege or prerogative of government has been granted to them (except to lay tracks across streets), and they cannot, therefore, be held to be subject to the duties which may be implied from a grant of a franchise authorizing the construction of a public highway.

The defendant's business is of recent origin. Their duties and liabilities are wholly undefined, except as they may be deduced from the application of well-established legal principles to other corporations in analogous cases. No case was cited on the argument, and none is known to exist, in which the duties of a body corporate, like the defendants, have been the subject of judicial consideration. The business of the defendants has no exact counterpart or model in any of the established instruments of commerce or agencies used by the public in the transaction of business. It bears a closer resemblance to the business carried on by warehousemen than to any other business known to the law. Except in the character of the property which is the subject of bailment, the business of the defendants corresponds in many respects, with that of the warehouseman. That is the only business which can, in my judgment, be safely used, by way of analogy, for the purpose of ascertaining whether or not, according to established principles of general law, the defendants are subject to the duty which the complainants ask the court to compel them to perform.

There can be no doubt, I think, that a warehouseman is not required by any general rule of law, to receive goods on storage against his will. In Add. Cont. 630, it is said: "A man cannot be made a depositary without his knowledge and consent. He cannot have the possession of another man's property, with its accompanying duties and responsibilities, forced upon him against his will."

This must be so from the very nature of such transactions, for all bailments, not made by force of statutory regulation, rest in contract, and no contract can exist without consent, express or implied. Warehouses, for the storage of grain, must, however, since the decision of the Elevator cases, reported under the title of *Munn v. Illinois*, 94 U. S. 113, be regarded as so far public in

**Nature of
stockyard
company's
business.**

**Analogous
to business
of ware-
houseman.**

**Obligations
of ware-
houseman.**

their nature as to be subject to legislative control. That case, it will be remembered, arose out of this state of facts:

Munn v. Illinois. By the constitution of Illinois, adopted in 1870, all elevators or store-houses, where grain or other property should be stored for compensation, were declared to be public warehouses, and the legislature was directed to pass such laws as might be necessary to give full effect to this provision. Statutes were afterwards passed defining the service which the owners of such establishments should render to the public, and also fixing the compensation which should be charged therefor. The validity of these statutes was assailed on the ground that they violated that provision of the federal constitution which prohibits a state from depriving any person of property without due process of law. When the case reached the supreme court of the United States, the court divided on the main question. Mr. Justice FIELD, in a dissenting opinion of remarkable power, declared the statutes to be unconstitutional. His argument was this: That it was not within the power of either a constitutional convention or of a legislature to change a business which was in its nature private to a public business, by simply so declaring: that the body politic could lawfully exercise no greater dominion or control over the business of the owners of these elevators, because they did business with the public, than it could over the business of a blacksmith, who shod horses for the public; and that it is only in cases where the government, either general or local, has conferred some right or privilege on a citizen, which he can use in connection with his property, or by means of which his property is rendered more valuable to him, or he thereby enjoys an advantage over others, that it may lawfully control him in the conduct of his business, by prescribing what service he shall render to the public, and regulating the compensation he may demand for such service. Mr. Justice STRONG concurred in this view. But the majority of the court took more advanced ground, in favor of the right of public control, and held that, when a citizen devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and renders himself subject, in the use of the property so devoted, to control by the body politic. The part of the opinion of the majority of the court which is most pertinent to the question now under consideration is that in which it said: "It matters not in this case that these warehousemen had built their warehouses and established their business before the regulations complained of were adopted. What they did was from the beginning subject to the power of the body politic to require them to conform to such regulations as might be established by the proper authority for the public good." From this statement of the law it would seem to be undeniable that until the proper public authority intervenes,

and establishes such regulations as it may deem necessary for the public good, the owners of property devoted to a public use of this character retain complete and absolute dominion over it, and may exclude any member of the public from its use that they see fit. Until the body politic puts in exercise its power to control the use of such property, its owner may use it as he pleases.

The discussion thus far has demonstrated, I think, that even if we were at liberty, in deciding a question of strict legal right against a new instrument of business, to enter the field of analogy, and if there was found there a somewhat similar instrument to the one in question which had been held to be subject to certain duties, to charge the new instrument with the same duties, on the ground of its similarity to the other, that no such duty as that which complainants claim could, by force of any general rule of law, be held to rest upon the defendants. The only other means by which the duty in question could have been created is by statute. The complainants say that it is imposed by the statute which created the defendants a body corporate. They do not say that it is imposed in express words. On the contrary, they admit that there are no words which, in plain terms, impose it. But their contention is that it should be implied from the powers granted and the general purpose of the statute. Thus it will be seen that the court, to sustain the complainants' claim, must be able to find evidence of an intention, not expressed in words, on the face of this statute, so clear and strong that it may, without fear of usurping legislative power, declare that such intention is part of the legislative will.

**Defendant
not under
express obli-
gation to
receive
cattle from
defendant.**

The defendants were created a corporation by a statute passed in 1873. P. L. 1873, p. 920. They are given power to locate, construct, and maintain all necessary yards and other structures, with "aqueducts and railway tracks, switches and turnouts, for the reception, safe-keeping, feeding, watering, marketing, killing, packing, and rendering, and for the weighing, delivery, and transport, of cattle and live stock of every description, and also dead and undressed animals that may be at or passing through the county of Hudson, and for the accommodation and transaction of the business of a general stock yard and market establishment for cattle and live stock." They are also given authority to purchase land, and build wharves, docks, and slips thereon, and to procure and run such vessels as shall be necessary for the transaction of their business, in transporting live stock and dressed animals, in and about the harbor of New York and the Hudson river. By the fourth section of their charter it is enacted that it shall and may be lawful for the defendants to make contracts with the several railroad companies in or (having) lines running through the county of Hudson, for the

**Defendants'
charter.**

transportation and delivery of live stock of every description at the yards of the defendants, and they are given power to lay tracks and turnouts to connect with the lines or tracks of each or all of the different railroad companies, said tracks to be used in the delivery of live stock to and from the defendants' yards. Authority is also given to the defendants to lay their tracks across the streets of Jersey City in such manner as to grade as the common council may direct, but in no case to lay their tracks parallel with the line of the street.

In considering what construction should be given to this statute, it will be important to keep in mind that the legislature, in enacting it, were creating a corporation to establish and carry on a business which was in its infancy even where it had existed longest, and which, in this State, was entirely new. The business was one which it was believed would be likely to be of great public utility,

if it was successful, but whether or not it could be made successful was uncertain when the statute was passed. To make the experiment, somebody had to risk his capital. In this state of affairs, it is not difficult to believe that there would be a natural disposition, on the part of the representatives of the people, to give those who were willing to embark their money in the venture an opportunity, free from any sort of restriction, to make the business a success, knowing that if it was made a success, and the public good should, at any time in the future, render it necessary that the corporation should be controlled in its conduct towards the public, the legislature could exercise such control. This, probably, is the reason, or one of the reasons, why the least trace cannot be found anywhere in this statute of a purpose to impose a single duty on the defendants, even in behalf of the public. Railroad corporations, it will be observed, are nowhere mentioned in it, except in the fourth section, and the provisions of that section make it conspicuously clear, as I think, that it was not the intention of the legislature to impose any duty on the defendants in favor of railroad corporations, except such as they should voluntarily take upon themselves by contract. The very service which the complainants say the defendants are bound to render to them, as a legal duty, arising by implication from the terms of this statute, it will be observed is the only thing in respect to which the defendants are made competent, by express words, to make contracts with railroad corporations concerning; the language of the statute in that regard being that it shall be lawful for the defendants to make contracts with the several railroad companies having lines running through Hudson county, for the transportation and delivery of live stock at the defendants' yards. It is important to notice that the legislature were dealing with the very matter now

Construction of charter.

No duty imposed on defendant.

under consideration, namely, what should be the relation of the defendants to railroad corporations having a terminus in Hudson county. The legislature probably believed that the works the defendants proposed to construct would be of great advantage to the railroads, affording them a safe and convenient place for making delivery of live freight to its consignees, and for that reason they gave the defendants permission to lay tracks connecting their yards with the railroads, and also authorize them to make contracts with the railroads for the delivery of live stock at their yards, but they went no further. They neither imposed upon the railroads the duty of making delivery of live stock, against their will, to the defendants, nor upon the defendants the duty of receiving live stock, against their will, from the railroads. It was obviously the intention of the legislature to leave the matter of the delivery of live stock by the railroads, and the reception of it by the defendants, to be controlled entirely by such contracts or arrangements as the parties might see fit to make. No duty in that regard is imposed by the statute, in express words, upon either, and, so long as this continues to be the case, no duty can be imposed by the courts without usurping legislative power. A remark made by Mr. Justice BULLER in *Jones v. Smart*, 1 Term R. 44, and quoted with approbation by Chief Justice BEASLEY in *Palmateer v. Tilton*, 40 N. J. Eq. 555, is directly in point. He said: "We are bound to take the act of parliament as they have made it. A *casus omissus* can in no case be supplied by a court of law, for that would be to make laws."

Thus far the case has been considered as if it were the proper subject of equity jurisdiction. That, however, is not my opinion. On the contrary, I think, both in its substance and details, it is entirely outside of the proper jurisdiction of a court of equity. It is without a single equitable feature or element. The suit is not brought to protect an exclusive franchise, as was the action in *Camden Horse R. Co. v. Citizens' Coach Co.*, 31 N. J. Eq. 525, on appeal, 33 N. J. Eq. 267; 1 Am. & Eng. R. R. Cas. 190, but the complainants' case stands on nothing but the violation of an alleged legal right, which right is, as a matter of law, disputed and unsettled, has the support of neither precedent nor principle, and rests on nothing but analogies and implications. A court of equity may interpose under some circumstances to protect a legal right, as when a violation is threatened, or is being actually committed, which will do irreparable damage, but it must be made clearly to appear that the complainant has the right he claims; for, if he is without right, the court is without jurisdiction. There can be no damage, irreparable or otherwise, where there is no violation of a right. To justify the interference of a court of equity in such a case, the legal right set up by the complainant

Complain-
ants case
not proper
subject of
equity
jurisdiction.

must be clear, for, as was said by Mr. Justice DIXON, speaking for the court of errors and appeals, in *Outcalt v. George W. Helme Co.*, 42 N. J. Eq. 665, where the question is one of legal right, a condition precedent to the right of the complainant to bring his adversary into a court of conscience is that the latter's conduct, which is claimed to be wrongful, shall appear to be unconscientious; and that this cannot be shown, unless it is made to appear that the defendant has violated a legal right which had been previously established against him by a judgment at law, or which, on the admitted facts of the case, appears to be free from doubt or question. The complainants do not complain that the defendants have invaded their property, and are there wantonly committing great and serious damage, nor that the defendants are so using their own property as to cause irreparable injury to the complainants' property, but their complaint is that the defendants refuse to give them such use of their (the defendants') property and servants as they are entitled to by law, and that they suffer irreparable harm in consequence. What the complainants want is that the court shall, for their benefit, control the defendants, not only in the use of their property, but in the conduct of their business. Nothing short of a case of the most extreme necessity, where the legal right is entirely free from doubt, the injury great and ruinous, and the defendants' conduct wholly indefensible, would justify the exercise of so strong a power by any judicial tribunal.

Besides, it is quite apparent, as I think, that the court could not attempt to extend to the complainants the relief they ask in this case, without very soon being confronted by a condition of affairs which would compel it either to usurp power, or to very greatly relax its control over the defendants. By the express terms of their charter, the defendants are given power to adopt regulations for the well ordering of their business. Under this power, they would probably have the right, among other things, to make a regulation, requiring that when live stock is delivered to them some evidence shall be delivered with it, showing that it is in a healthy condition, or that they shall have the right to have it inspected by their own inspector before receiving it, and also to prescribe other regulations, fixing the hours in each day when stock may be delivered, and the places on their yards at which each particular kind must be delivered. The power of making such regulations as may be necessary and convenient for the well ordering of their business has been committed by the legislature to the defendants, and belongs to them alone. Their power in this respect is subject to but a single condition, and that is the regulations they make must be reasonable. In all other respects, the defendants are the judges, and their judgment is final. If the reasonableness of any regulation they may adopt should be dis-

**Court cannot
interfere
with conduct
of defendants
business.**

puted in a court of law, the question whether it was reasonable or not would, in the first instance, have to be settled by a jury. A common law judge has no authority to pass upon a question of that kind, except in reviewing the verdict of a jury. *State v. Overton*, 24 N. J. Law, 435; *Railroad Co. v. Ayres*, 29 N. J. Law, 393. Up to the time this controversy arose the defendants had adopted no regulations for the conduct of their business with railroad companies. There was no reason they should; for, up to that time, all their transactions with such corporations had been carried on under arrangements that were mutually satisfactory and advantageous. Now, however, if the court should decide that the complainants were entitled to the right they claim, the defendants would, without doubt, exercise their right to conduct their business, in their own way, by the adoption of such regulations as to them might seem proper. These regulations would undoubtedly become at once a new subject of controversy. The defendants would probably so frame them as to narrow the right accorded to the complainants to its smallest possible limit. Whose province would it be to settle the many questions which would certainly be raised respecting the reasonableness of the regulations adopted by the defendants,—the chancellor or a jury? Could a court of equity in a case where the sole ground of its jurisdiction is a right to interpose to prevent irreparable damage, draw to itself as incident to the jurisdiction thus acquired, so many litigations, which, according to the well established boundary between the two jurisdictions, belong exclusively to the common law courts? If the chancellor should assume jurisdiction in this case, he would, in my judgment, undertake to exercise what Judge SIIARSWOOD in *Audenried v. Philadelphia etc. R. Co.*, 68 Pa. St. 370, called a "dangerous and alarming power." He would in effect, deprive the directors of the defendant corporation of their right to manage its affairs, and substitute himself as its supreme manager. This I cannot advise him to do. Both for the want of legal right, and also because the case is not the proper subject of equity jurisdiction, the complainants' bill should, in my judgment, be dismissed, with costs.

INTERNATIONAL EXPRESS CO.

v.

GRAND TRUNK R. CO. OF CANADA.

(Maine Supreme Judicial Court, December 10, 1888.)

Discrimination—Express Business—Foreign Corporation.—Under the provisions of the Maine statute requiring railroad companies to extend equal facilities and accommodations to all persons or companies engaged in the express business within the State, foreign, as well as domestic, express companies are protected.

Same—Evasion of Statute—Injunction.—In answer to a bill to enforce compliance by a railroad company with the statute requiring it to give equal facilities to all express companies, the defendant stated that it had taken the express business on its route exclusively into its own hands. The evidence showed that, in answer to plaintiff's demand for express facilities, the railroad company stated that it was inconvenient to it to accommodate two express companies. The plaintiff having urged its right to obtain facilities, the defendant thereupon stated that it would take the business into its own hands, and asserted that as a temporary arrangement, until it could obtain the necessary equipment for the work, it had employed the express company which already had facilities, to do the business for it. It was shown that notwithstanding such pretended agreement, no perceptible change had been effected although a period of nearly 4 years had elapsed. *Held*, that, under the circumstances, the method adopted must be deemed to be an attempt to evade the spirit of the statute and that the remedy asked must be granted.

ON report from Supreme Judicial Court.

Bill by the International Express Co. against the Grand Trunk Railway of Canada, for a mandatory injunction requiring the respondent to transport over its road the plaintiff's express freight. A preliminary injunction was granted pending the suit.

C. S. Strout, H. W. Gage and F. S. Strout for complainant.

A. A. Strout for defendant.

PETERS, C. J.—This bill was brought to require the defendants to transport over the railroads controlled and operated by them, between the points of Portland and Lewiston, the freight business of the plaintiffs, upon equal terms and conditions with those granted other express companies. The statute requires that railroads shall extend equal facilities and accommodations to all persons or companies. Rev. St. c. 51, § 134. The court has acted upon this statute, sustaining the right which the plaintiffs contend for. *New England Express Co. v. Maine Cent. R. Co.*, 57 Me. 188. The same doctrine is strongly defended in *McDuffee v. Portland & R. R. Co.*, 52 N. H. 430, and in many cases. Difficult questions might arise in some instances as to what should be considered strictly express business. But no question of the kind occurs here.

Statement
of case.

Discrimina-
tion between
express
companies.

because the defendants maintain the right to refuse taking any and all express business, excepting as it shall be controlled and managed by themselves. There can be no doubt, however, that there is a marked line between the general business of express companies and that of railroad companies. The express company is a wheel within a wheel, doing a business of details, much of the responsibility of which consists in work both preliminary and subsequent to the railroad transportation. It is well known that where railroad companies have undertaken to assume exclusively to themselves that class of business over their roads, they have managed it under an administration independent of their general affairs. We indulge in these observations, which will have an application upon a question of facts in the case which will presently appear.

It is objected by the defendants that the plaintiffs are a foreign, and not a domestic, corporation. That fact does not disentitle them to maintain this complaint. The statute protects "all persons engaged" in the business within the State. We permit the commercial world to do business within our borders.

Foreign corporations entitled to facilities.

The defendants set up in defence of their right to ignore the claims of the complainants that they had taken the express business on their route, within the points named, exclusively into their own hands, and that they are under no obligation to extend privileges or accommodations to express companies who are competitors of themselves, and that the statute provision was to protect the express companies as between themselves, and not as between them and railroad companies. In this alleged defence are two questions—First, whether the allegation of fact is sustained; secondly, what result will follow if the facts are proved. Both questions have been argued by the counsel for the parties. The second question we do not propose on this occasion to consider, as we are satisfied that the facts alleged by the defendants are not proved. The burden of excuse or explanation is on them. They must show why it is that the complainants' demands are not complied with. Their evidence on this point fails. It breathes the spirit of evasion and pretext. It may be formally and superficially true, but it is really untrue. The outside gauze does not cover the inside meaning. It is not pretended that the defendants were doing any express business on their own account when they first refused to carry the express freight of the complainants. The answer was that it would be inconvenient to them to accommodate two express companies. The Merchants' Express Company was then doing its business over their road. But, by the increasing impurity of the complainants for an equal recognition with the

Company taking business into its own hands—Evasion of statute.

other express company, the defendants were led to resort to the excuse that they would take the business into their own hands, and they asserted that, as a temporary arrangement, until they could equip themselves for the work, they had employed the Merchants' Express Company to do the business for them. It seems on its face a singular mode of business, to claim to do an express business themselves, and hire an express company to do it for them. Such real or pretended arrangements would easily avoid the law, which was designed to prevent unequal privileges and accommodations. The evidence discloses that the idea was more in intention than in fact. One of the managers of the railroad company states that on April 30, 1885, the company had assumed the business. On May 11, 1885, its counsel wrote the complainants that the company would do so. The pretension is that there was a contract in writing that the Merchants' Express Company were to act as their agents during their (railroad company's) pleasure, which, of course, might not continue longer than the complainants' importunity lasted. The affidavit of Haines, of the Merchants' Express Company, seems to consist mostly of an argument against the injustice of another company competing for the business with them, when there was not business enough even for one company, and he asserts that a temporary contract had been made by which they were to act as agents of the railroad company. But no contract is produced in evidence, and all its terms are not stated. Its production might disclose whether the express company were or not to take all the earnings for doing all the work, and whether it be a real, or merely a nominal and deceptive, bargain. The rebutting affidavits go to show that no perceptible change has been effected; that all the routine business appears to be the same now as ever before; that the Merchants' Express Company retains its offices, its signs, its books, its mode of receiving and delivering goods, and giving receipts therefor; and that the Canadian Express Company also runs over nearly all of the same route. The complaint in this case was heard in May, 1885, and it would not be denied by the defendants that no change has been discernible from that time till the present, a lapse of nearly four years. The injunction should be made perpetual to this extent: that it shall stand unless, upon a motion to dissolve, it appear that a new state of facts exists which would make it reasonable to qualify or dissolve the same. The complainants are entitled to costs. Decree accordingly.

WALTON, VIRGIN, LIBBEY, FOSTER, and HASKELL, JJ., concurred.

Discrimination—Freight Rates—Other Considerations.—In answer to an action against a railroad company for a discrimination in rates for the carriage of coal,

the defendant alleged that it became liable to the favored company for a trespass upon its mine from which great damage resulted ; that it had also made a contract with the favored company by which the latter was to furnish defendant with coal for use on its locomotives at a reduced price, and that the favored company had contracted to give the defendant a prior right to the purchase of its stock in the event of its designing to make a sale within a stated period. The answer further alleged, that it was believed when said contract was made, that the amount to be paid by the favored company for the transportation of coal would be equal to scheduled rates. *Held*, that as it could not be ascertained from the contract or otherwise that the considerations set out were sufficient to make up the discount on the schedule rate, it would afford no protection to the defendant for the discrimination in rates to which plaintiff and other shippers were subjected, and that the defence was insufficient. *Goodridge v. Union Pacific R. Co.*, 37 Fed. Rep. 182.

Same—Difference in Quantity.—The fact that a reduced rate was given because the quantity of freight shipped by the shipper was much larger than that shipped by the petitioner, and hence that there was a larger proportionate expense attending to the handling and transportation of the smaller shipment, it is not sufficient justification for a discrimination in rates. *Kingsley v. Buffalo, New York & Philadelphia R. Co.*, 37 Fed. Rep. 181.

Same—Interstate Commerce Act—Indictment.—Under section 2 of the interstate commerce act it is immaterial how the prohibited discrimination is effected, whether by a special rate afforded to one shipper and not to another, or by a "rebate, drawback or other device," and for that reason it is unnecessary to aver in an indictment by what particular device the defendant discriminated in favor of a particular shipper. In an indictment for a violation of the third section of the act which declares it to be unlawful for a carrier subject to the provisions of the act "to make or give any undue or unreasonable preference or advantage to any particular person . . . in any respect whatever or to subject any particular person . . . to any undue or unreasonable prejudice or disadvantage in any respect whatever," it is not necessary to aver that the service referred to as having been rendered for the parties named and charged for at a different rate was rendered "under substantially similar circumstances and conditions." A count in an indictment under the statute which leaves it uncertain whether the pleader intended to charge that the defendant demanded of merchants doing business in Hannibal greater compensation for the transportation of goods from that city to Helper than he demanded of the railroad company for the transportation of goods between the same points, or greater compensation than he demanded of the latter company for transporting goods from Chicago to Helper, is bad on demurrer. Under the provision of section 10 of the interstate commerce act that any agent of a railroad company that is subject to the provisions of the act shall be amenable to the penalties denounced therein if he wilfully does any prohibited act ; it is not necessary either to allege or prove that the particular unlawful act complained of, was done under authority conferred by his principal or by its direction. It is sufficient to show that the accused was in fact an agent of a railroad subject to the provisions of the act, and that the wrong was committed under the color of his office or agency. *United States v. Tozer* 37 Fed. Rep. 635.

37 A. & E. R. Cas.—40

PRICE

v.

DENVER AND RIO GRANDE R. CO.

(Colorado Supreme Court, March 13, 1889.)

Carriage of Goods—Connecting Carrier—Shipper's Directions—Lien.—If a railroad company which has received goods for transportation to an extra-terminal point with directions to forward the same thereto upon a specified line of railway, delivers the same to a connecting carrier other than that specified by the shipper, and such connecting carrier receives the goods in the usual course of business without notice of the special directions, the latter carrier is entitled to charge reasonable freight rates for the carriage of the goods and has a lien therefor.

APPEAL from District Court, Pueblo County.

Actions of replevin by William H. Price against the Denver & Rio Grande R. Co., for certain salt belonging to the plaintiff and retained by the defendant under an alleged lien for freight charges. The plaintiff appeals from judgments for the defendant.

Pitkin & Richmond for appellant.

John M. Waldron and *E. O. Wolcott* for appellee.

STALLCUP, C.—A large quantity of salt in barrels was shipped by railway from Milwaukee or Chicago to Pueblo. The salt was received at Omaha from a connecting line, and carried from there to Denver by the Union Pacific Railway Company. Denver being the end of its line in the direction of Pueblo, it delivered the salt to the said railway company, appellee, to be carried by it on its connecting line from Denver to Pueblo; and accordingly the said railway company, appellee, paid the back charges for carrying the salt to Denver, and received and carried it to Pueblo. The said William H. Price, the appellant, claiming to be the owner, and entitled to the possession, of the salt there, replevied the same from the said railway company, appellee, upon its refusal to deliver the same, upon tender of the said back charges by it paid, without tender or payment of the reasonable charges for carrying the salt from Denver to Pueblo; it being claimed that the said railway company, appellee, was not entitled to payment of such charges, for the reason that it had carried the salt without authority so to do, in that the consignor thereof had directed that the salt should be carried from Denver to Pueblo by another railway company, having a connecting line running from Denver to Pueblo. A portion of the said salt was replevied in one of these actions, and the remainder thereof in the other. The issues and the evidence

were substantially the same in the two cases. The court found the issues of fact for the railway company, appellee, in both cases, and gave judgment accordingly.

There was considerable evidence to show that the salt was received by the railway company, appellee, at Denver, from the Union Pacific Railway Company, in the usual and customary course of business between connecting lines of railroads, in good faith and belief that the said Union Pacific Railway Company had good right and authority to so deliver the same to be carried from Denver to Pueblo, and without knowledge that its authority in this regard was in any way limited; and there being no testimony that the said railway company, appellee, knew that the said Union Pacific Railway Company had been directed to deliver the said salt to another railway company at Denver, for carriage to Pueblo, the findings in this regard were warranted by the evidence. The railway company, appellee, having so received and carried the salt from Denver to Pueblo, the question arises, was it entitled to have its reasonable charges therefor, and to have a lien upon the said salt until such charges were paid?

Special directions to receiving carrier.

If the consignor does not accompany the goods so shipped, some one must act as his agent at the end of the several lines over which the goods are carried, in the matter of selecting a connecting line, and delivering the goods to such connecting line, to be carried on to their destination. In the absence of any other person the carrier so acts at the end of its line. *Briggs v. Lowell R. Co.*, 6 Allen 246. Their being no other person to so act, in this instance, at the end of the line of the said Union Pacific Railway company, that company's action in the matter was as the agent of the consignor, and accordingly bound him. The acts of such agent being within the scope of the business in hand, and clearly within the powers apparent from and implied by the circumstances, it must follow that the limitations thereon imposed by the consignor were without effect upon a succeeding carrier, dealing with such agent without knowledge thereof. And the rights of such carrier so receiving and carrying the goods would be the same as if no such limitations had been put upon the agent's authority in the matter of forwarding the goods. *Higgins v. Armstrong*, 9 Colo. 38; *Patten v. Union Pacific R. Co.*, 29 Fed. Rep. 590. See *Schneider v. Evans*, 9 Amer. Law Reg. (N. S.) 536, and note. The judgments should be affirmed.

Receiving carrier is forwarding agent of shipper.

Connecting carrier not bound by special direction without notice thereof.

RISING, C., concurs specially. DE FRANCE, C., concurs.

PER CURIAM. For the reasons stated in the foregoing opinion the judgment is affirmed.

Connecting Carriers—Special Directions—Liens.—If the carrier receiving goods is instructed by the shipper to forward them to their destination by a certain connecting carrier, a connecting carrier other than that specified only has a right to freight and a lien therefor in the event of its having received the goods and transported them in ignorance of the shipper's directions. Marks upon the package indicating the route are to be considered by the jury in determining the question of the carrier's knowledge. *Bird v. Georgia R. Co.*, 72 Ga. 655; s. c., 27 Am. & Eng. R. R. Cas. 39.

HANSON

v.

FLINT & PERE MARQUETTE R. CO.

(*Wisconsin Supreme Court January 29, 1889.*)

Carriage of Goods—Connecting Carriers—Liability.—In an action to recover damages for the destruction of goods shipped over defendant's line it appeared that the bill of lading was in the following terms: "Shipped by R. P. & Co., the following articles in good order to be delivered in like good order as addressed without unnecessary delay," "consigned to H. & K., Onekama, Mich." *Held*, that the contract entered into was a contract for the carriage of the goods to Onekama, and that the defendant was not released from liability by the fact that the goods were warehoused at the termination of its road for the purpose of being forwarded by a connecting carrier.

Same—Authority of Agent—Evidence.—In such an action, it is not necessary that the express authority of the defendant's agent to contract to ship the goods over a connecting line should be proved when it is shown that he acted as agent in a proper place for receiving goods by the company, and was in possession of the company's stamp to be used on such receipts, and that the company took possession of the goods and caused them to be shipped with at least a presumptive knowledge of the terms of the receipt.

APPEAL from Circuit Court, Milwaukee County.

Action by H. N. Hanson against the Flint & Pere Marquette R. Co., to recover the value of certain goods lost while in transit under a bill of lading issued by the defendant. The defendant appeals from a judgment for the plaintiff.

E. Mariner and *F. M. Hoyt* for appellants.

Winkler Flanders, Smith, Bottum & Vilas for respondents.

ORTON, J.—The facts are substantially as follows: Roundy, Peckham & Co., merchants of the city of Milwaukee, on November 2, 1887, upon an order from Hanson & Kirsh, the respondents of Onekama, Mich., shipped to them by the appellant company a large bill of goods. Roundy, Peckham & Co. on that day sent the goods to the ware-

house of the appellant by their drayman, and received in return the following receipt: "Original." "MILWAUKEE, ———, 188—." "Shipped by Roundy, Peckham & Co. the following articles, in good order, to be delivered in like good order, as addressed, without unnecessary delay." "Consigned to Hanson & Kirsh, Onekama, Mich." "Description of articles." —"Weight." Here follows a list of the articles shipped, covering four sheets of paper, upon each of which is the same heading as above, and on the face of the receipt, and on each page or sheet, is stamped by the agent of the appellant company, the following; "F. & P. M. R. R. Co." "rec'd." "Nov. 2nd, 1887," "By Agent," "Milwaukee." On the face of the stamp is written the letter "P." The stamp was affixed to the receipt by a Mr. Powlett, the agent of the appellant company on that day, who wrote the letter "P." thereon as his initial letter, and the stamp used by him was the one customarily used by the agent for such purpose. A portion only of the goods arrived at Onekama, their destination, the remainder having been burned or damaged at Manistee, Mich., by fire. The value of the goods so lost was \$651.74, for which, and interest of \$45.62, making a total of \$697.36, the jury rendered a verdict for the plaintiffs by direction of the court, and from the judgment thereon this appeal is taken.

The contention of the learned counsel of the appellant is that the defendant was entitled to show that its route and line as a carrier extended no further than Manistee, Mich., and that said goods were safely carried to that point, and deposited in a warehouse, and in a place set apart for the use of the captain and proprietor of a boat called "Adriene," which plied between Manistee and Onekama, who receipted for the goods, and was in the act of removing them, and had removed a part onto his boat when the warehouse was totally destroyed by fire, and the goods not then removed were destroyed or injured without negligence of the defendant; and that the defendant was entitled to show further that Roundy, Peckham & Co. well understood that the custom was between the defendant's line and such connecting carrier, that such connecting carrier had nothing to do with the defendant's line and the circumstances connected with the giving of the receipt, and that the agent, Powlett, had no authority to make a through bill of lading between Milwaukee and Onekama. This evidence was ruled out by the court, and proper exceptions taken. The admissibility of this evidence depends upon the legal character of the receipt as being a full and perfect contract to carry the goods through the entire route, or otherwise. If the receipt constitutes a through bill of lading of the goods from Milwaukee to Onekama, then it could not be contended that any parol evidence could be given to explain or vary it, and what is established by contract cannot be changed or affected by custom.

The general usage of a railroad company in respect to forwarding goods marked for points beyond its terminus will be deemed to enter into its contract of transportation. *Hooper v. Chicago & N. W. R. Co.*, 27 Wis. 81; *Wood v. Milwaukee & St. Paul R. Co.*, Id. 541. Nor could it be contended that the express authority of the agent must be proved when he acted as such in the proper place for receiving goods for the company, and was in possession of the company's stamp to be used on such receipts, and the company took possession of the goods, and caused them to be shipped, with knowledge of the receipt, which it must be presumed the company had before they were shipped. No other proof of agency is necessary than that the agent's acts justify the party dealing with him in believing that he had authority. *Kasson v. Noltner*, 43 Wis. 646.

The sole question, therefore, is, does the receipt import a full and complete contract to carry the goods to their destination, or such a contract that it was fully performed by a delivery of the goods to the connecting carrier? I cannot well see how a receipt or bill of lading could be drawn to make a through contract, if this receipt does not. It has all the usual terms. The destination and the consignees at that place are named. The goods are "shipped" by Roundy, Peckham & Co., "in good order, to be delivered in like good order, as addressed, without unnecessary delay." The address is "Hanson & Kirsh, Onkama, Mich.," as the consignees. Outside of the stamp upon it it is more like a shipping bill or bill of lading than a mere receipt. The goods are not received, but shipped, by Roundy, Peckham & Co. The stamp is marked "Rec'd. Nov. 2, 1887, by agent, P. Milwaukee." All the apt words to make a perfect through contract are used, and none omitted. Manistee as the destination is not mentioned, nor is it found in the contract anywhere for any purpose, nor is it known from the receipt or contract that there was any connecting carrier on the route, or, if so, what one, by water, from Manistee. The respondents took no responsibility of carriage beyond Manistee, but the company assumed it, and contracted for it. Even within the rule contended for by the learned counsel of the appellant,—which is claimed to be the general rule by the authorities,—"that where a carrier receives goods for transportation beyond his own line he is not responsible for any loss occurring beyond his line, unless there is a special contract, or some usage of business, which shows that such carrier takes the goods for the whole route," the defendant was bound to carry the goods the whole route; for there was a special contract to that effect, as we have seen. In *Wahl v. Holt*, 26 Wis. 703, the bill of lading, or

"shipping receipt," as it is called in the opinion, had the same apt words: "To be delivered in good order and condition as when received, as addressed on the margin, or to his or their consignees." On the margin was: "Account, C. Wahl, George F. Wilson, Providence, R. I." But the receipt in that case had also, "Care A. T. Co., Buffalo," and, "By the Commercial Line of Propellers from Milwaukee to Buffalo." These words were held to mean only that the line of propellers by which the goods were shipped ran "from Milwaukee to Buffalo," and "were not intended to define the points between which the Commercial Line had undertaken to transport the goods;" and it was held that the proprietor of the Commercial Line contracted 'o carry the goods to Providence, R. I. In that case, as in this, there was mixed land and water transportation, by connecting lines. The shipping receipt, or bill of lading, in the present case, is more explicit, definite, and complete, as a through contract, than that in the above case, and there is no mention of an intermediate point at the termination of the defendant's line, to break the continuity between Milwaukee and Onekama. It is very clear that that case rules this, and in sufficient authority for holding that this is a through contract, without citing other authorities. That case as well as this is readily distinguishable from *Parmelee v. Western Transportation Co.*, 26 Wis. 439, as well as from all other cases in which the end of the route was held to be an intermediate point, or the end of the defendant's line.

We think that the court was warranted in directing a verdict for the plaintiffs. The judgment of the circuit court is affirmed.

Connecting Carriers—Goods—Liability.—When a through bill of lading is issued by the carrier receiving the goods, each of the connecting carriers is liable for damages to the goods shipped, with recourse against the carrier actually in fault. *Richardson v. Charles P. Chouteau*, 37 Fed. Rep. 533. The M. P. Ry. Co. received a piano at W., to be carried to L., and delivered to a connecting common carrier for transportation to P. At L. the track of the M. P. Ry. crossed the track of the B. & M. R. Co., the tracks and stations being connected by a "Y." The piano was carried to L. by the M. P. Ry., and delivered to two draymen, to be transferred to the B. & M. R. Co. at its station. Before delivery to the last named railroad company, and while in possession of the draymen, it fell out of the wagon, and was broken, and was not received by the agent of the B. & M. R. Co. It was held that the verdict of the jury in favor of the owner of the piano, in an action against the M. P. Ry. Co., was sustained by the evidence, and that by the instructions of the court the question as to whether the draymen or the B. & M. R. Co. was the connecting common carrier was fairly submitted to them for decision. *Missouri Pacific R. Co. v. Young* (Neb.), 41 N. W. Rep. 646.

Same—Freight Line.—When goods had been shipped on a through bill of lading issued by a freight line, and a railroad company through whose fault the goods were lost, pleads in an answer to a claim therefor that it was not associated with the other companies in the freight line, the fact that the defendant accepted a through way bill at the price carried out therein and took its regular division of the freight, and that its agent agreed to accept freight under the freight line contracts, is sufficient to warrant a finding that the defendant accepted and was liable on the contract. *Harris v. Cheshire R. Co.* (R. I.), 16 Atl. Rep. 512.

Same—Change in Way Bill.—In an action against a connecting carrier to recover for the loss of goods in which it is claimed that the defendant made a change in the way bill of the name of the point of destination, testimony that the copy of the way bill given to the plaintiff by the defendant's agent did not show the change, that the way bill was passed over to another connecting road, when if it had only run to the point inserted it would naturally have been retained by the defendant, and that the way bill of a connecting company, on receiving the car, ran to the original point of destination, is evidence upon which the jury might find that the change was made by the defendant. *Harris v. Cheshire R. Co.* (R. I.), 16 Atl. Rep. 512.

Same—Transfer to Connecting Carrier—Venue of Action.—In Georgia, an action founded upon the refusal of a railroad company to transfer the cars in which goods have been shipped to a connecting railroad so that the goods might be carried in the same car over the latter road to a point on such connecting company's line, ought to be brought in the county where the defendant refused to make the contract with the plaintiff or in the county of the defendant's residence. Accordingly, where an action was brought in the county in which the *terminus* of the defendant's road was situated, and the declaration, as amended, alleged in substance that after the goods had been shipped in car load lots and before their arrival at the *terminus* of the defendant's road, the plaintiff notified the defendant's agent at its *terminus* that the goods were coming and requested that they be transferred in the same cars to the connecting line, and that after the goods arrived at the *terminus* of the same, request was made and that the defendant refused to comply therewith, it does not show a breach of the contract in the county in which the *terminus* of the road is situated, and an action cannot be maintained therein. *Coles v. Central Railroad & Banking Co. (Ga.)*, 9 S. E. Rep. 127.

Same—Liability for Loss.—See *Alabama G. S. R. Co. v. Mount Vernon Co.*, 35 Am. & Eng. R. R. Cas. 657, note, 662; *Fox v. Boston & M. R. Co.*, *post*.

FOX

v.

BOSTON AND MAINE R. CO.

(*Massachusetts Supreme Judicial Court, January 2, 1889.*)

Carriage of Goods—Special Contract—Connecting Carrier.—When a special contract is made with a shipper by which the carrier agrees to deliver goods which are liable to injury by freezing, at a point on a connecting line by a specified date, and the carrier knows that the special contract is made for the purpose of avoiding the danger of injury by frost, the carrier with whom the contract is made is liable for injuries to the goods by freezing whilst being transported over the connecting line, if the injury is caused by the negligent delay of the carrier in delivering the goods thereto.

ON exceptions from Superior Court, Essex County.

Action of contract by Elijah Fox against the Boston & Maine R. Co. to recover damages for injury to a car load of apples caused by the defendant negligently failing to deliver the same

to a connecting carrier within the time specified by the contract. The jury returned a verdict for the defendant. The plaintiff excepted.

J. P. & B. B. Jones for plaintiff.

William H. Moody for defendant.

MORTON, CH. J., delivered the opinion of the court:

The plaintiff offered to prove that on February 22, 1881, he made a special contract with the defendant, by the terms of which it was to transport a car load of apples from Haverhill to Portland and deliver it to the Maine Central Railroad, a connecting railroad, in time to be transported by the latter corporation to Bangor, by a freight train which left Portland early in the morning of the 23d day of February; that the weather was mild on the 22d and 23d days of February, and that "the agreement with the defendant was made with reference to the mildness of the weather, and the importance of having the apples delivered to the Maine Central Railroad at the agreed time;" that the defendant negligently delayed to deliver the apples at the time agreed, and by reason of this negligence they "were caught in cold weather in course of transportation from Portland to Bangor, arriving at the latter place in a frozen condition."

Evidence
of special
contract.

The presiding justice ruled that "If the market value of the apples when they reached Portland was only diminished in the respect that a liability of being frozen during the course of the transportation by the Maine Central Railroad was incurred or increased by reason of the negligent delay of the defendant in the transportation from Haverhill to Portland, the plaintiff cannot recover in this action for that diminution in the market value."

If we understand this ruling, its effect was to restrict the plaintiff's right to recover the diminution in the market value of the apples at Portland caused by the delay, and to prevent his recovering anything for the damage to the apples by freezing in the transportation from Portland to Bangor.

The general rule is that where goods are delivered in the usual way to a carrier for transportation, and there is a negligent delay in delivering them, the measure of damages is the diminution in the market value of the goods between the time when they ought to have been delivered and the time when they were in fact delivered. *Ingledeu v. Northern R. Co.*, 7 Gray 86; *Cutting v. Grand Trunk R. Co.*, 13 Allen 381; *Scott v. Boston & N. O. Steamship Co.*, 106 Mass. 468; *Harvey v. Conn. & P. R. Co.*, 124 Mass. 421. These cases are put upon the ground that the duty of the carrier is the measure of his liability; that his duty is to carry the goods to the end of his line, and that any future

General
rule as to
measure of
damages
for delay.

risks to which the goods may be exposed are not within the contemplation of the parties or the scope of their contract.

But we think a different rule prevails where the parties make a special contract which provides for certain risks to which the goods are exposed on the connecting line. Thus in the case before us, the parties made a special contract by which the defendant agreed to deliver the apples to the Maine Central Railroad by a fixed time, so that they would arrive in Bangor in the afternoon of the 23d day of February; both parties knew that the apples were not to be sold in Portland, but were to be forwarded to Bangor; and the special contract was made for the purpose of avoiding the danger of the apples freezing on the connecting line. This risk was anticipated, and contemplated by the parties; and if the danger which it was intended to provide against was incurred by reason of the negligent failure of the defendant to perform its contract, it ought to be responsible in damages.

The damages are not too remote. If the freezing had occurred on the defendant's line, it cannot be doubted that the law would regard the delay as the proximate cause of the damage. It is none the less so because it happened on a connecting line. The damage was not caused by any extraordinary event, subsequently occurring, but was caused by an event which was, according to the common experience, naturally and reasonably to be expected—a change of temperature.

The case is thus distinguished from the cases of *Denny v. New York Central Railroad Company*, 13 Gray 481 and *Hoadley v. Northern Transportation Company*, 115 Mass. 304. In each of these cases, the loss to the plaintiff was caused by an extraordinary event, a fire and a freshet; and the court held that the defendants, although guilty of negligent delay, were not responsible because the event was not one which would reasonably be anticipated. In the case at bar the event which caused the loss was contemplated by the parties when they made their contract, as a probable consequence of the breach of it.

The case before us is distinguishable from *Ingledeu v. Northern Railroad Company*, 7 Gray 86. In that case the opinion is based upon the ground that it did not appear that "the defendants assumed any duty in relation to the delivery of the boxes to another carrier," or that they "were charged with any duty in forwarding the ink to Keene, or that the officers of the defendant corporation knew of its transportation beyond their own line."

The facts of the two cases are different, and for the reasons above stated we are of opinion that different rules of damages are to be applied in them, and that in the case at bar upon the facts which he offered to prove, the plaintiff is entitled to recover the

damage which he sustained by reason of the freezing of the apples between Portland and Bangor.

Exceptions sustained.

Carriers of Goods—Connecting Lines—Liability.—See *Alabama G. S. R. Co. v. Mount Vernon Co.*, 35 Am. & Eng. R. R. Cas. 657, note, 662; *Hanson v. Flint & P. M. R. Co.*, *ante*, p.

HARTWELL

v.

NORTHERN PACIFIC EXPRESS CO.

(*Dakota Supreme Court, February 4, 1889.*)

Carriage of Goods—Limitation of Liability—Signature of Condition.—Under the provision of the Dakota Civil Code, §§ 1261, 1262, that a common carrier cannot limit his liability by general notice, but may limit it by special contract; and that a consignor or consignee by accepting a bill of lading with a knowledge of its terms assents to the rate of hire, the time, place and manner of delivery therein, but his assent to any other modification of the carrier's liability can only be manifested by his signature to the same, a consignee is not bound by a condition in a receipt given by an express company to the effect that the company will not be liable for loss or damage unless claim thereof be presented within a specified time, when such receipt has not been signed by the consignee, or any one acting for him.

APPEAL from District Court, Richland County.

Action to recover damages for the loss of a certain trunk and its contents whilst in the course of transportation by the defendant company. The defendant appeals from a verdict for the plaintiff.

W. E. Dodge for appellant.

W. S. Lander for respondent.

TRIPP, C. J.—This is an action brought by the plaintiff for recovery of the value of a certain trunk and its contents, lost by the defendant express company in shipping over its line from Wahpeton to Wyndmere, in the territory of Dakota. The defence, so far as it affects this appeal, was that the trunk was shipped by plaintiff under an express contract with the defendant that the defendant, in case of loss, should not be responsible in a greater sum than \$50; and that in no event should the defendant be liable for loss unless the claim therefor should be presented to the defendant in writing, at its office in Wahpeton, within 90 days from the time of making the contract; and that no such claim was ever made until long after

Facts.

the period of 90 days. The jury having returned a verdict of \$50 and interest, under the charge of the court, and judgment having been rendered thereon in favor of the plaintiff for the amount of the verdict and costs, the defendant appealed to this court, claiming that there was no sufficient evidence to sustain the verdict, in that there was no evidence of any claim, in writing or otherwise, having been presented to the defendant within 90 days, as stipulated in the receipt given the plaintiff, and that the court erred in its instructions to the jury.

The case shows, as it appears from the abstract, that one Harwood had brought the trunk from the State of New York, and at Wahpeton, the end of his journey, had delivered it to the defendant express company, to be delivered to the plaintiff at Wyndmere, her home, and that he took from the defendant's agent at Wahpeton a receipt, which, among other provisions, contained the following: "In no event shall the company be liable for any loss or damage, unless the claim thereof shall be presented to them in writing at this office within ninety days after this date, in a statement to which this receipt shall be annexed. The party accepting this receipt hereby agrees to the conditions herein contained." The receipt was signed by the agent of the company at Wahpeton, but was not signed by the plaintiff, nor by Harwood, acting for her. This receipt Harwood says he forwarded in a letter to the plaintiff, but she says she did not receive it, and its contents were supplied by secondary evidence. The court instructed the jury that under the contract, if the plaintiff was entitled to recover, she could not recover to exceed \$50, with interest at 7 per cent. from the day of shipment. The court further instructed the jury, of which defendant complained, and to which it excepted as follows: "But if you find that a claim was made by the plaintiff, or by any one authorized to act for her, to the company, through its agent at Wahpeton, within ninety days, and that they had knowledge of the loss of the trunk and its contents, then you are authorized to find a verdict for the plaintiff. Second. I will charge you, further, that if you find from the evidence in the case that a claim was made within ninety days, and the company had a knowledge of the loss of the trunk within that time, and, further, that this claim was made upon the agent at Wahpeton, that no written demand is necessary."

Under the issues, as submitted to the jury, they must have found that the claim was made within 90 days; that the defendant claims there was no evidence whatever of any claim in writing being presented to the defendant, that an oral claim was not sufficient under the terms of the contract, and that the charge was misleading. In reply to this, the plaintiff in this court contends that the charge was more favorable to defendant than he was entitled to,—First, that under our statute (section 1263, Civil

Code) the receipt in the nature of a bill of lading was not a contract binding on her, because her "consent was not manifested by her signature thereto;" and, second, that the condition of the contract was substantially complied with.

Section 1263 of our Civil Code reads as follows: "A passenger, consignor, or consignee, by accepting a ticket, bill of lading, or written contract for carriage, with a knowledge of its terms, assents to the rate of hire, the time, place, and manner of delivery therein stated. But his assent to any other modification of the carrier's rights or obligations contained in such instrument can only be manifested by his signature to the same." The language of the section does not seem to be ambiguous, and, if it means what on first reading seems to be its express meaning, we shall not be required to examine the evidence presented in the abstract to determine whether the terms of the alleged contract were complied with. The section comes from the proposed Civil Code submitted by the New York commission to the New York legislature, but enacted for the first time in this territory in 1866, and in California subsequently, in 1872. It comes to us in the same language reported by the commission, and was adopted by California with no material change. This section, as well as the two immediately preceding (sections 1261, 1262), were founded on the decisions of New York as they existed when the report was submitted; and a reference to the doctrine of these decisions, as well as the rules of the early common law, which they are claimed to have followed, will serve to aid in the construction of the section in question.

The rules of the common law are simple and well defined. The carrier was always liable for all losses, except those occasioned by the act of God or the public enemy. He was an insurer of the property committed to his custody, even against fire and theft or robbery by armed men. This was on grounds of public policy, to prevent conspiracy of the carrier with the thief or trespasser. HOLT, C. J., in *Coggs v. Bernard*, 2 Ld. Raym. 918, says: "This is a politic establishment, contrived by the policy of the law for the safety of all persons the necessity of whose affairs oblige them to trust these sorts of persons, that they be safe in their ways of dealing." Lord MANSFIELD says (*Forward v. Pittard*, 1 Term R. 27) the carrier was held liable for such loss "to prevent litigation, collusion, and the necessity of going into circumstances impossible to be unraveled. The law presumes against the carrier, unless he shows it was done by the king's enemies, or by such act as could not happen by the intervention of man; as storms, lightning, and tempests. . . . It appears from all the cases for over a hundred years back that there

**Limitation of
carrier's
ability—
Authorities
examined.**

are events for which the carrier is liable, independent of his contract. By the nature of his contract, he is liable for all due care and diligence, and for any negligence he is suable on his contract. But there is a further degree of responsibility by the custom of the realm; that is, by the common law, a carrier is in the nature of an insurer." BURKROUGH, J., in *Smith v. Horne*, 8 Taunt. 144, says: "The doctrine of notice was never known until the case of *Forward v. Pittard*," *supra*, from which we quote the language of Lord MANSFIELD, which he says he argued many years before. An examination of that case fails to show any such limitation, or to make any reference to the subject of notice. The doctrine seems first to have been recognized that the liability of the carrier could be limited by a special contract and notice brought home to the party in 1804 (*Nicholson v. Willan*, 5 East, 507, by Lord ELLENBOROUGH), though the doctrine was expressly denied by Lord KENYON in 1793, in *Hide v. Proprietors*, 1 Esp. 36, in which he says: "Where a man is bound to any duty, and chargeable to a certain extent by the operation of law, in such case he cannot, by any act of his own, discharge himself." And, again, referring to the common carrier, he says: "They cannot discharge themselves by any act of their own, as by giving notice, for example, to that effect." The doctrine, however, announced by Lord ELLENBOROUGH in *Nicholson v. Willan*, *supra*, seems to have subsequently obtained, and to have been carried so far as to allow the common carrier to cast off all liability whatsoever. And in *Maving v. Todd*, 1 Starkie, 72 (1816), the defendant carrier having given notice that "he would not be responsible for loss by fire," Lord ELLENBOROUGH nonsuited the plaintiff; remarking, however, that, "if this action had been brought twenty years ago, the defendant would have been liable, since by the common law a carrier is liable in all cases except two,—where the loss is occasioned by the act of God, or the king's enemies, using an overwhelming force which persons with ordinary means of resistance cannot guard against,"—thus showing the departure that the courts had made in so short a period. In 1830, the statute of 1 Wm. IV. c. 68, among other things enacted: "No public notice or declaration heretofore made, or hereafter to be made, shall be deemed or construed to limit, or in any wise affect, the liability at common law of any carriers, but that all and every such carrier shall be liable as at common law to answer for the loss or injury of the property, any public notice or declaration by them made and given contrary thereto, or in any wise limiting such liability, notwithstanding."

It would seem, then, that the common law of England, as it existed up to the time of our Revolution, did not permit a carrier to limit his liability by notice. Judge BRONSON in *Hollister v. Nowlen*, 19 Wend. 234-242, after reviewing the common-law

decisions, and referring to the innovation made by Lord ELLENBOROUGH upon the doctrine of notice, says: "The doctrine [referring to the decision of Lord ELLENBOROUGH, *supra*] in question was not received in Westminster Hall without much doubt; and, although it ultimately obtained something like a firm footing, many of the English judges have expressed their regret that it was ever sanctioned by the courts. Departing, as it did, from the simplicity and certainty of the common-law rule, it proved one of the most fruitful sources of legal controversy which has existed in modern times. When it was once settled that a carrier might restrict his liability by a notice brought home to his employer, a multitude of questions sprung up in the courts which no human foresight could have anticipated. Each carrier adopted such a form of notice as he thought best calculated to shield himself from responsibility without the loss of employment, and the legal effect of each particular form of notice could only be settled by judicial decision. Whether one who had given notice that he would not be answerable for goods beyond a certain value, unless specially entered and paid for, was liable in case of loss to the extent of the value mentioned in the notice, or was discharged altogether; whether, notwithstanding the notice, he was liable for a loss by negligence, and, if so, what degree of negligence would charge him; what should be sufficient evidence that the notice came to the knowledge of the employer; whether it should be left to the jury to presume that he saw it in a newspaper which he was accustomed to read, or observed it posted up in the office where the carrier transacted his business; and, then, whether it was painted in large or small letters, and whether the owner went himself or sent his servant with the goods, and whether the servant could read,—these and many other questions, were debated in the courts, while the public suffered an almost incalculable injury in consequence of the doubt and uncertainty which hung over this important branch of the law. 1 Bell, Comm. 474. After years of litigation, parliament interfered, in 1830, and relieved both the courts and the public, by substantially reasserting the rule of the common law. . . . If, after a trial of thirty years, the people of Great Britain, whose interests and pursuits are not very dissimilar to our own, have condemned the whole doctrine of limiting the carrier's liability by a notice; if, after a long course of legal controversy they have retraced their steps, and returned to the simplicity and certainty of the common-law rule,—we surely ought to profit by their experience, and should hesitate long before we sanction a practice which not only leads to doubt and uncertainty concerning the rights and duties of the parties, but which encourages negligence, and opens a wide door to fraud." The question in *Hollister v. Nowlen*, from which this quotation is made, was one of notice,—whether

the carrier by general notice could limit his liability for the luggage of the passenger; and in discussing this question of notice the learned judge further uses the following pertinent language: "The argument is that where a party delivers goods to be carried, after seeing a notice that the carrier intends to limit his responsibility, his assent to the terms of the notice may be implied. But this argument entirely overlooks a very important consideration. Notwithstanding the notice, the owner has a right to insist that the carrier shall receive the goods subject to all the responsibilities incident to his employment. If the delivery of goods under such circumstances authorizes an implication of any kind, the presumption is as strong, to say the least, that the owner intended to insist on his legal rights, as it is that he was willing to yield to the wishes of the carrier. If a coat be ordered from a mechanic after he has given the customer notice that he will not furnish the article at a less price than one hundred dollars, the assent of the customer to pay that sum, though it be double the value, may perhaps be implied; but if the mechanic had been under a legal obligation, not only to furnish the coat, but to do so at a reasonable price, no such implication could arise." And referring to the common law he says: "The doctrine that a carrier may limit his responsibility by a notice, was wholly unknown to the common law at the time of our revolution. It has never been received in this nor so far as I have observed in any of the other States." *Id.* 248.

This subject received also, at the same time, a very careful consideration in *Cole v. Goodwin*, 19 Wend. 251, in which the carrier sought to avoid his liability for a trunk of the passenger by notice brought home to him that "all baggage is at the risk of the owner." Judge COWEN, after a very elaborate review of all the common-law decisions, announced his conclusion as follows: "I therefore think the defendants in the case at bar must take the consequence of their obligation as common carriers, notwithstanding the notice to the plaintiff. Admitting that the plaintiff acceded in the clearest manner to the proposition in the notice that his baggage should be carried on the terms mentioned, I think the contract thus made was void on his part, as contrary to the plainest principles of public policy. In thus holding, we follow the law as it is expressly admitted by the English judges to have stood at the period when our ancestors declared themselves independent; and, while we thus fulfil our constitutional duty, we are not, like Westminster Hall, obliged to lament while we enforce the law." The doctrine of these cases was extended in *Gould v. Hill*, 2 Hill, 623, in which a majority of the court held that "common carriers cannot limit their liability or evade the consequences of a breach of their legal duties as such, by an express agreement or special acceptance of the goods to be trans-

ported." But the court of appeals in *Dorr v. New Jersey Steam Navigation Co.*, 11 N. Y. 485, affirming the doctrine of *Hollister v. Nowlen* and *Cole v. Goodwin*, *supra*, denies the doctrine of *Gould v. Hill*, *supra*, and says: "That a carrier may, by express contract, restrict his common-law liability, is now, I think, a well established rule of law," citing English and American cases.

The case of *Dorr v. New Jersey Steam Navigation Co.*, *supra*, was one of carriage of merchandise in which the carrier sought, by notice contained in the bill of lading, to limit its liability as to fire, accidents, etc., holding itself liable only "for ordinary care and diligence." In *Bissell v. New York Cent. R. Co.*, 25 N. Y. 442, this doctrine was extended to allow the carrier to contract with a passenger to take upon himself the risk of damage from the negligence of the agents and servants of the carrier. The case was, however, decided by a majority of court only; Chief Justice DENIO, with whom were Judges WRIGHT and SUTHERLAND, making a vigorous dissent. In *New Jersey Steam Navigation Co. v. Merchants' Bank*, 6 How. (U. S.) 378 the supreme court of the United States held that a provision in a bill of lading, stipulating "that the carriers are not to be responsible in any event for loss or damage," does not exonerate them from want of ordinary care. And in *Southern Express Co. v. Caldwell*, 21 Wall. (U. S.) 266, in which a company provided in its receipt that it would not be liable for loss on any package, etc., delivered to it, unless claim should be made within ninety days, the supreme court held that such contract was valid; and in an elaborate opinion Justice STRONG, referring to "the conflict existing in modern decisions," as to how far the carrier may by contract limit his common-law liability, says: "All the modern authorities concur in holding that, to a certain extent, the extreme liability exacted by the common law originally may be limited by express contract. The difficulty is in determining to what extent, and here the authorities differ. Certainly it ought not to be admitted that a common carrier can be relieved from the full measure of that responsibility which ordinarily attends his occupation without a clear and express stipulation to that effect obtained by him from his employer. And even when such a stipulation has been obtained the court must be able to see that it is not unreasonable.

. . . Hence, as we have said, it is now the settled law that the responsibility of a common carrier may be limited by an express agreement made with his employer at the time of his accepting goods for transportation, provided the limitation be such as the law can recognize as reasonable, and not inconsistent with sound public policy. This subject has been so fully considered of late in this court that it is needless to review the authorities at large. In *York Co. v. Illinois Cent. R. Co.*, 3 Wall. (U. S.) 107, it is ruled that the common-law liability of a common carrier may

be limited and qualified by special contract with the owner, provided such special contract do not attempt to cover losses by negligence or misconduct. And in a still later case (*New York Cent. R. Co. v. Lockwood*, 17 Wall. 357), where the decisions are extensively reviewed, the same doctrine is asserted. The latter case, it is true, involved mainly an enquiry into the reasonableness of an exception stipulated for, but it unequivocally accepted the rule asserted in the first mentioned case. The question, then, which is presented to us by this record, is whether the stipulation asserted in the defendant's plea is a reasonable one, not inconsistent with sound public policy." In Pennsylvania, the right of the carrier to limit his liability by special acceptance is well established. *Atwood v. Reliance Co.*, 9 Watts 87; *Bingham v. Rogers*, 6 Watts & S. 495; *Laing v. Colder*, 8 Pa. St. 479.

The decisions of the different States, as will be seen without further reference, are by no means harmonious; and it affords a strong argument in favor of the propriety of settling the conflicting decisions by statute, as has been done in this territory. The decisions of the courts have varied, and are now conflicting, as to whether the common-law liability of the carrier may be limited (1) by notice brought home to the party; (2) by special acceptance of goods for carriage; (3) by express contract between the parties. There is much diversity of opinion of the courts how far such liability may be restricted or limited on grounds of public policy. Our statute

has aimed to settle these conflicting decisions. **Statutory provisions construed.** Sections 1261, 1262, Civil Code, read as follows; "Sec. 1261. The obligations of a common carrier cannot be limited by general notice on his part, but may be limited by special contract." "Sec. 1262. A common carrier cannot be exonerated, by any agreement made in anticipation thereof, from liability for a gross negligence, fraud, or wilful wrong, of himself or his servants." Section 1263, *supra*, supplements and makes clear section 1261. Section 1261 is founded upon the common-law doctrine as announced by Justices BRONSON and COWEN in *Hollister v. Nowlen*, and *Cole v. Goodwin*, 19 Wend. *supra*, and denies the right of a common carrier to limit his liability by a general notice. It adopts the decision of *Dorr v. New Jersey Steam Navigation Co.*, *supra*, in so far as it promulgates the rule of allowing the carrier to limit his liability by special contract; but it limits and qualifies that case in so far as it applies to a case of bill of lading accepted by the shipper, by providing in section 1263 that the shipper who does not sign the bill of lading or contract of carriage consents only by accepting it to the rates of hire, time, place, and manner of delivery. If the carrier desires him to assent to any modification of his common-law liabilities contained in such instrument beyond this, he must require it to be

signed by the shipper ; in other words, passenger tickets, bills of lading, and written contracts for carriage are not "special contracts," within the meaning of section 1261, that can limit the obligations of the common carrier, unless they are signed by the passenger, consignor, or consignee. These two sections prescribe the manner in which the liability of the common carrier may be limited, and section 1262 prescribes the extent to which that liability may be limited. It limits the right of parties in advance of carriage to agree to exonerate from liability for gross negligence, fraud, or wilful wrong of the carrier or his servants. All contracts to relieve from gross negligence, fraud, or wilful wrong, on the part of the carrier or his servants, are by the terms of this statute expressly prohibited. The object of this section is obvious. They settle for this territory the conflicting decisions of the common law. They make unnecessary any discussion of the better rule, worked out by the learned decisions, to meet a fancied necessity for modification of that laid down by the older cases. This legislation has settled the conflict, and adopted a rule while somewhat variant, yet much in harmony with the later and better decisions of the courts. Applied to this case, the receipt relied upon by defendant did not have the signature of plaintiff or consignor. It was therefore not a "special contract," which could limit the carrier's liability ; it was a mere notice, which would not limit his obligation. His obligation was to deliver the trunk to the consignee named in the contract. He contracted to do so under his general obligation as a common carrier, and that he would be liable for the loss or injury thereof, except from (1) an inherent defect, vice, or weakness, or a spontaneous action, of the property itself ; (2) the act of a public enemy of the United States, or of this territory ; (3) the act of the law ; or, (4) any irresistible superhuman cause." Section 1275, Civil Code. He did not modify this contract in any manner provided by statute, and he must be held to his liability as such common carrier. Under this statute, parties can only relieve themselves from their obligations as common carriers in the manner therein pointed out. There is another provision of our statute to which our attention has been called, which perhaps should receive some consideration by the court in the determination of this case. Section 958 of the Civil Code reads as follows: "Every stipulation or condition in a contract, by which any party thereto is restricted from enforcing his rights under the contract by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void." The first part of the section contains nothing new, and is substantially the common-law doctrine as pretty uniformly announced by the decisions of all the courts ; but the latter clause, which declares unlawful every stipulation or condition in a contract "which limits the time within

which the party may enforce his rights," is perhaps against the great weight of modern authority. The question has been much mooted, and it has been vigorously contended that the law alone should establish limitations of actions. This view was urged upon the attention of the court by no less distinguished counsel than Benjamin F. Butler in *Fullam v. New York Union Insurance Co.*, 7 Gray, 61; but the court then denied the doctrine, and asserted that the opposite view had so long obtained there as to become the settled law of the State. And the same view is held in *Brown v. Roger Williams Insurance Co.*, 5 R. I. 394; *Northwestern Ins. Co. v. Phoenix Oil & Candle Co.*, 31 Pa. St. 448; *Wilson v. Aetna Insurance Co.*, 27 Vt. 99; *Ames v. New York Union Insurance Co.*, 14 N. Y. 266. It is claimed that the earlier decisions of New York took the other view, which was adopted by the commissioners, but the later view in New York and other States seems to be adopted by the supreme court of the United States in *Southern Express Co. v. Caldwell*, 21 Wall. (U. S.) 264, cited *supra*. There are, however, very respectable authorities which announce the rule laid down by our statute, and the earlier decisions of New York, among which are: *Eagle Insurance Co. v. Lafayette Insurance Co.*, 9 Ind. 443; *French v. Lafayette Insurance Co.*, 5 McLean, 461.

But it is not worth the while of the court to compare the reasoning of the respective courts, or to determine which is the better adapted to our locality. Our legislature has seen fit to settle the conflict, and its decision is as much binding upon us when it determines the conflict against, as well as when it determines it in favor of, the weight of authority as announced by the courts. The language of the statute confines its prohibition of limitation to enforcement of rights, and is especially intended to cut off all limitations of time for commencement of actions. The provision of this receipt is perhaps rather a condition precedent than a limitation, and, as it is not necessary to this case to determine whether the limitation in this receipt comes within the prohibition of this statute, we shall leave this question for adjudication by the court whenever it shall be fully presented in a case involving this precise point.

In the view we have taken of this case, the defendant has nothing to complain of in the charge of the court. It was more liberal than he was entitled to under the statute, as we have construed it; and it will be unnecessary for us to examine whether, under the evidence, there was a substantial compliance with the terms of the receipt or contract of carriage, as to the claim within 90 days, since it was not assented to by her signature, nor binding upon the plaintiff.

The judgment of the district court is affirmed. All the justices concur.

Carriage of Goods—Limitation of Liability—Estoppel.—When a receipt fixing the value of property received by an express company at \$50 is not binding upon a consignor, the fact that the consignor inserted the name of the consignee or the place of delivery in the receipt in question, does not estop him from recovering the full value of the property despatched. *Adams Express Co. v. Hoeing* (Ky.), 11 S. W. Rep 205.

See also *Missouri Pac. R. Co. v. Fagan*, 35 Am. & Eng. R. R. Cas. 666, note, 671.

Carriers of Goods—Condition Limiting Liability—Signature.—The signing of a bill of lading containing a reasonable condition limiting the carrier's liability, binds the shipper, even though he be ignorant of its contents; but he may show that his signature was obtained by fraud. *Black v. Wabash, St. L. & P. R. Co.*, 111 Ill. 351; s. c., 25 Am. & Eng. R. R. Cas. 388.

MISSOURI PACIFIC R. CO.

v.

HAYNES *et al.*

(*Texas Supreme Court, November 30, 1888.*)

Carriage of Goods—Delivery—Notice to Consignee.—The consignee of certain cotton requested a railroad company to place it upon a side track, which passed the platform of a compress company, for the purpose of being unloaded. On the afternoon of the same day the railroad company placed the cars containing the cotton on the side track, but failed to notify either the consignee or the compress company. Shortly thereafter the cotton was destroyed by fire. *Held*, that under the provisions of the Texas statute that railroad companies shall continue liable as common carriers until delivery to the consignee at the point of destination, and that if the carrier at the point of destination shall use due diligence to notify the consignee, and goods are not taken by the consignee, but are stored in the depots and warehouses of the carrier, the carrier shall thereafter only be liable as warehousemen, the company remained liable, notwithstanding the fact that it had placed the cotton on a side track, as directed.

APPEAL from District Court, Hopkins County.

Action by J. C. R. Haynes & Co. against the Missouri Pacific R. Co. to recover damages for the destruction of certain cotton whilst in defendant's possession. The defendant appeals from a judgment for the plaintiff.

Todd & Hudgins for appellant.

E. W. Terhune and Perkins, Gilbert & Perkins for appellees.

STAYTON, C. J.—This cause was tried without a jury, and the conclusions of fact, so far as necessary to be stated, are as follows:

"(3) That on the 9th, 10th, and 11th days of November, 1887, the plaintiffs shipped from Black Jack Grove, Texas, and Campbell, Texas, to Greenville, Texas, through the defendant, Missouri Pacific Railway Company, 99 bales of cotton, and received regular bills of lading therefor—the haul being entirely within the State of Texas, and

part of said cotton being consigned to plaintiffs at Greenville, Texas, and part to the compress company, 'notify J. C. R. Haynes & Co. ;' that plaintiffs, J. C. R. Haynes & Co., were the real consignees of all of said cotton, and were so recognized and treated by all the parties to this action.

"(4) That 87 bales of said cotton were brought to Greenville, Texas, by defendant railway company, and had reached said point on the 11th and 12th of November, 1887, and that plaintiffs learned of its arrival on Sunday the 13th day of November, 1887.

"(5) That on Monday, November 14, 1887, the plaintiffs made arrangements with the compress company by which the latter agreed, as a matter of accommodation to plaintiffs, to unload said cotton on the compress platform, when the same was ready for unloading, and check it off.

"(6) That the cotton compress was situated in the city of Greenville, not far from the track of the railway company, and that the latter had built a side track from its station and yard to and passing the platform of the compress company, which side track was owned and controlled by the railway company, and was built for the convenience of the railway company and the compress company.

"(7) That early on the morning of November 14, 1887, plaintiffs went to the depot of the railway company, and demanded of the latter's agent the delivery of said cotton, and requested him to have it placed on the compress platform. The agent replied that the cotton was in the yard, and as soon as the necessary switching could be done he would deliver the cotton. The compress platform is not under the control of the railway company.

"(8) About 1 o'clock P. M. of Monday, November 14, 1887, plaintiffs requested the agent of the railway company to have the cotton delivered at the compress platform, as they desired to have it checked and marked and tagged; stating to the agent that Mr. R. C. Mattox, of the compress company, was at the platform, and ready to unload the cotton; and the agent of the railway company replied that as soon as the necessary switching could be done he would place the cotton on the platform.

"(9) That on said 14th day of November, 1887, the said R. C. Mattox was at the compress platform from 1 o'clock P. M. until after 4 o'clock P. M., and that at 2 o'clock P. M., and from 3 o'clock P. M. until after 4 o'clock P. M., plaintiffs had an employe at said platform waiting to sample and mark said cotton when it should be unloaded and placed on the platform.

"(10) That on November 14, 1887, at 3:30 o'clock P. M., the railway company had the three cars, containing plaintiffs' said 87 bales of cotton, placed on the side track, and by the side of the compress platform, but failed to notify either the plaintiffs or the

compress company; and neither plaintiffs, nor any of their agents, nor the compress company, or any of its agents, knewor were informed that plaintiff's cotton had been placed on said side track.

"(11) That at 4 o'clock P. M. of November 14, 1887, the cotton compress, its platform, the cotton thereon, and the cars containing plaintiffs' cotton, together with the plaintiffs' cotton thereon, were destroyed by fire. The evidence fails to show the origin of such fire.

"(12) The amount of cotton belonging to plaintiffs on said cars, and so destroyed, was 40,463 pounds, and was of the market value of 9½ cents per pound, or the aggregate value of \$3,844.08.

"(13) There was no custom as to delivery of cotton consigned to Greenville.

"(14) In agreeing to receive and unload the cotton, the compress company was acting in the way of accommodation to plaintiffs, and not for consideration."

No objection is made to any of these findings, other than the seventh, ninth, and tenth; but it is claimed that the evidence does not support these. A careful examination of the evidence leads to the conclusion that it sustains these findings, and a statement of the evidence would serve no useful purpose.

As conclusions of law, the court found as follows:

"(2) That said cotton at the time of its destruction by fire had never been delivered to plaintiffs or to the compress company.

"(3) That at the time of the destruction of said cotton, the defendant, Missouri Pacific Railway Company, held said cotton as a common carrier, and its liability as common carrier had not terminated.

"(4) That, in order to relieve itself of liability, it devolved upon the defendant, the Missouri Pacific Railway Company, to establish by proof that the loss of said cotton was occasioned by inevitable accident, beyond the power of said defendant to guard against or avoid; and, having failed to establish this, the defendant, Missouri Pacific Railway Company, is liable to plaintiffs for the value of said cotton, to wit, \$3,844.08, and interest thereon at the rate of 8 per cent. per annum from the 14th day of November, A.D. 1887."

It is urged that the second and third conclusions of law are erroneous. The evidence and the findings leave no doubt that the place of destination for appellees' cotton was the cotton compress in the city of Greenville, and appellant's liability as a common carrier continued from the commencement of the trip "until the cotton was delivered to the consignee at the point of destination." Rev. St. 281. The evidence and findings preclude any holding that there was any agreement between ap-

**Company
not relieved
from liability
as a
carrier.**

pellant and appellees that the latter should have and assume possession of the cotton while on the cars, and, in the absence of this, it must be held that possession was in fact as in law with appellant; the cotton never having been removed from the cars, and placed on the compress platform. The evidence shows that until this was done the right to possession, and possession, was at all times with appellant. So long as possession remains with the carrier, there can be no delivery; but in case of railway transportation the character in which the carrier holds after freight has been safely taken from its cars and deposited on platform or in warehouse may be affected by notice to the consignee of its arrival at destination. There is a conflict of authority as to whether the extraordinary liability that attaches to the carrier continues after goods have been actually removed safely from cars, and deposited in a safe place, unless notice be given to the consignee or owner; but the cases which hold that such liability ceases when the goods are unloaded and placed in a safe place do not claim exemption from the more onerous responsibility until the goods have been unloaded from the cars, and deposited in a safe and suitable place. Hutch. Carr. 371, and citations. In *Rice v. Boston & W. R. Corp.* the supreme court of Massachusetts thus asserts the rule: "A railroad corporation does not discharge itself of its duty as a carrier by merely bringing goods to the terminus of its road. It is bound also to unload them with due care, and put them in a place where they will be reasonably safe and free from injury. Until this is done the duty and responsibility which attach to a corporation as carriers do not close. *Thomas v. Boston & P. R. Co.*, 10 Metc. (Mass.) 472, 477; *Plains Co. v. Boston & M. R. Co.*, 1 Gray (Mass.) 263, 272. In the latter case . . . it is expressly stated that goods must not only be safely carried, but also be discharged on the platform of a depot, or put into a place of safety." 98 Mass. 214; *Cahn v. Michigan Cent. R. Co.*, 71 Ill. 98.

The fact that appellees may have made arrangements with the compress company to have that done which was incumbent on the carrier before there could be a delivery does not alter the situation of the parties nor their rights. If the compress company, as the agent of appellees, had unloaded the cotton, and placed it on the platform where appellees desired to have it, and where appellant was bound to place it before it could be relieved from responsibility as carrier, then the delivery would have been complete; but this was not done by either party, and the cotton was in the possession of appellant as carrier when destroyed by fire. No agreement or usage is shown which could make anything short of an actual delivery operate to relieve appellant from its obligation as carrier. If, however, there had been

Arrange-
ments with
compress
company
immaterial.

an agreement between the parties that appellees would receive the cotton on the cars, and unload it themselves when the cars were placed at the destination, under the statute in force in this State, we are of opinion that appellant would then be liable under the facts. The statute provides that, "If the carrier at the point of destination shall use due diligence to notify the consignee, and the goods are not taken by the consignee, and have in consequence to be stored in the depots or warehouses of the common carriers, they shall thereafter only be liable as warehousemen." Rev. St. art. 282. The spirit of this statute, under such an agreement, would require the carrier to use such diligence as the statute contemplates to notify the consignee that the cars were at the place where they were to be unloaded; and especially would this be necessary when the track leading to and by the compress platform was often occupied with cars not to be unloaded at the compress. No effort was made to notify appellees or the compress company that the cars were on the side track ready to be unloaded. It was shown that this might have been done by the exercise of the slightest diligence. If without direction to place the cotton on the platform of the compress company this had been done by appellant, then notice, or due diligence to give notice, that it had been so placed, would have been necessary before appellant would have been relieved from responsibility as carrier, unless, as agent for appellees, the compress company had received it. However the law may be elsewhere, under the statutes in force in this State the liability of the carrier continues until the thing carried is actually delivered to the owner or consignee at such place as the nature of the carriage requires the delivery to be made, or at some other that may be agreed upon, unless due diligence be used to notify the owner that it has arrived at place of destination. After such notice has been given, or due diligence used to give it, if the thing be not received within a reasonable time, the carrier may store it in a safe place, which is in some cases, and with some classes of property, may be the car in which transported; and from the expiration of such reasonable time responsibility as carrier will cease and that of warehouseman begin.

There is no error in the judgment, and it will be affirmed.

Carriers of Goods—Notice of Arrival.—See *Burlington & M. R. Co. v. Arms*, 16 Am. & Eng. R. R. Cas. 272, note 275.

Same—Delivery—Notice to Consignee.—An action was brought against a common carrier for the violation of a contract of affreightment. On the trial the plaintiffs introduced testimony tending to prove delivery of certain wheat to the defendant for shipment over its road; that the defendant agreed to deliver the same in the city of Hannibal to the plaintiff, but had failed to so deliver it; that defendant had placed the car of wheat on a side track in the city of Hannibal which belonged to the Missouri Pacific Railroad, and that while standing there the car, together with the wheat, was burned up and totally destroyed.

Defendant's evidence tended to prove that the wheat was received in the city of Hannibal on the morning of February 25, 1887, that there was no delay in the shipment, and that the wheat arrived at its destination on time. Defendant's line terminated at the limits of the city of Hannibal, and its trains were brought into the city over the track of the Missouri Pacific R. Full car loads of freight were handled by the latter company in the month of February, and for some time previous thereto. The plaintiffs, who were engaged in the milling business in Hannibal, and had been in the habit of shipping grain over its road, had instructed the defendant to place all car loads of grain to be delivered to the plaintiffs on what was known as the "Badger State" side track, belonging to the Missouri Pacific System. This side track extended through a lumber yard, and was some distance from plaintiff's mill and the railroad depot or warehouse. The car in question on its arrival, was, by the switch foreman of the Missouri Pacific Railroad, placed on a side track, and remained there until the afternoon of February 27th, when it, together with its contents, was destroyed by fire. There was some evidence tending to prove that one of the plaintiffs was notified on the 25th of the arrival of this particular car of wheat.

Plaintiffs testimony in rebuttal was to the effect that they had no notice whatever of the arrival of the wheat, and that they had not been advised that the wheat had been shipped to them. They also introduced evidence for the purpose of proving that they received car loads of wheat at different places, and that they had not given defendant instructions to deliver wheat shipped to them on the "Badger State" side track, or on any other particular side track. The defendant had not pleaded that plaintiffs were not present to receive the wheat at the time of its arrival, and that, after a reasonable time, defendant had placed the car in a reasonable safe place, in charge of its servants, and that by reason of these facts defendant held the wheat in the capacity of a warehouseman. The court accordingly held, that as such a defence required to be specially pleaded, it followed that the defence in the case must be confined to the question of the delivery or no delivery. The court said "It has been held in this State that if goods shipped on railroads arrive at their destination on time, then the carrier is under no legal obligations to notify the consignee of their arrival. But the company may after the expiration of a reasonable time, either unload the goods and place them in its warehouse, or if the goods are in bulk and full car lots, (such as grain) which cannot readily be unloaded and stored, then the company may place the car in a reasonably safe place under the direct charge and care of its servants, and when this is done, the liability of the railroad company is changed from that of a common carrier, to that of a warehouseman. To that extent, and to that alone, have the courts in Missouri dispensed with notice to the consignee. *Rankin v. Pacific R. Co.*, 55 Mo. 168; *Gashweiler v. Wabash, St. L. & Pac. R. Co.*, 83 Mo. 119; 25 Am. & Eng. R. R. Cas. 403; *Buddly v. R. Co.*, 20 Mo. App. 209; *Niswanger v. Transfer Co.*, 18 Mo. App. 103; *Bell v. St. Louis & I. M. R. Co.*, 6 Mo. App. 363; *Wilson Machine Co. v. Louisville & N. R. Co.*, 71 Mo. 203; 6 Am. & Eng. R. R. Cas. 593. But as we have shown the question as to whether the defendant held the wheat at the time of its destruction as a common carrier or warehouseman does not arise." It was further held, that an instruction based upon the defence that the defendant was only liable as a warehouseman, was erroneous, and that it was also erroneous to give an instruction which declared as a matter of law, that because a shipper of freight has or is presumed to have notice of the time of its arrival at the place of destination and fails to be present to receive it that the carrier would then have the right to make such disposition as it pleased of the goods, and by so doing relieve itself of all liability, either as a common carrier or warehouseman. The court also held, that an instruction given by the court, that if the jury found from the evidence, that previous, and up to the time of the shipment of the grain in question, there existed an ordinary and usual course of dealing between the parties in reference to the delivery of grain in bulk, and that by virtue of such course of dealing, it was the usage of the parties to deliver grain in bulk by leaving the car on a side track usually used by the parties for that purpose, and that the grain in question was so deposited in good order on the side track and safely remained there reasonably long enough after its arrival,

to enable plaintiffs to inspect freight, such deposit of the car of grain upon the side track was a delivery of the grain to the plaintiffs, although no notice of its arrival was given, was erroneous, in so far as it failed to require the defendant to notify the plaintiffs that the car had been placed on the side track. The court said with reference to this point: "While a carrier may, without notice to the consignee, after the arrival of the goods, change his relation to the goods from that of a common carrier to a warehouseman, yet the duty remains with the carrier to *actually deliver* the goods to the consignee, and it is the duty of the carrier to make reasonable efforts to *find* the owner, and if the liability of a common carrier still exists, and the goods are delivered to the wrong person, the carrier under any circumstances, is liable to the true owner for the value of the property. If the carrier holds the goods in the capacity of a warehouseman, and there is a wrong delivery, then the carrier is not liable except for actual negligence. But in any case, an absolute and actual delivery must be made or a state of facts must be pleaded and proved which excuses a failure of delivery. In the case at bar, defendant says that when it placed the car on the "Badger State" side track, that this was an actual delivery to plaintiffs. The usual place for the delivery of freight by a railroad company, is the depot or freight warehouse. But usage and custom between the shipper and carrier, may have established another and a different place of delivery, or parties may stipulate for the delivery of the goods elsewhere. The instruction given by the court of its own motion presents this view, but the instruction is fatally defective, in failing to require defendant to *notify* plaintiffs, that the car had been *placed* on the side track. We confidently assert, that the principle cannot be maintained, that because plaintiffs had been in the habit of receiving freight shipped over defendant's road on this particular side track, or had instructed defendant to so deliver all goods shipped to them, that defendant could place the car of wheat in question on the side track, and without any notice whatever to plaintiffs, treat this as a complete delivery, and thereby relieve itself of all further liability, either as a common carrier or warehouseman. If that was the law there would be no protection to consignees after the arrival of freight at its destination." *Pindell v. St. Louis & H. R. Co.*, St. Louis Court of Appeals, March 5, 1889.

MISSOURI PACIFIC R. Co.

v.

VANDEVENTER.

(*Nebraska Supreme Court, March 20, 1889.*)

Common Carrier—Limitation of Liability—Constitutional Prohibition.—A railroad company operating a line of railroad in Nebraska is a common carrier, and cannot under the provisions of the constitution limit its liability, as such, by special agreement with a shipper.

ERROR to District Court, Richardson County.

B. P. Waggener and *I. Reavis* for plaintiff in error.

Frank Martin for defendant in error.

COBB, J.—This action was brought in the district court of

Richardson county by the defendants in error against the plaintiff in error for \$256.50, the alleged value of 15 hogs; being part of a car load of hogs shipped by the defendants in error over the railroad of plaintiff in error from Stella, Neb., to Kansas City, Mo., and which were claimed to have been lost by reason of the negligence of the railroad company. The defendant in said action, among other defences, alleged in its answer that no notice was given defendant of such pretended loss of hogs before removing the remainder from the car at Kansas City, as by the terms of the shipping contract plaintiffs were bound to do, as a condition precedent to a right to demand of defendant reparation for any loss which might occur in the shipment of said stock. The cause was tried to a jury, which returned a verdict for the plaintiffs, with damages of \$334.55.

The following interrogatories were submitted by the court to the jury for special findings of fact: (1) Was the company or its agents guilty of any negligence in the transportation of the hogs? and, if, the jury answer "Yes," they will say in what particular the company was negligent; to which the jury answered, "Yes," in the delay of the car containing the hogs from Hiawatha to Atchison, Kan., of 24 hours. (2) Was notice in writing of the loss of 15 hogs given the defendant before the stock was mingled with others, or removed from the place of destination? to which they answered, "We don't know." The defendant's motion for a new trial having been overruled, and judgment having been entered on the verdict, the cause is brought to this court on error. The errors assigned are numerous, but such only as are discussed in the brief of counsel will be considered. These arise chiefly upon the construction and legal effect to be given to certain clauses in the contract of shipment, and the effect to be given to the evidence introduced by the defendant in the court below as to the number of hogs shipped and the number delivered by the railroad company at the place of delivery.

Morgan H. Vandeventer, one of the plaintiffs, testified in their behalf that he shipped a car of hogs on May 29, 1883, from Stella, Neb., to Kansas City, Mo., consigned to A. J. Gillispie & Co.; that there were 69 hogs shipped, and that, when the car reached the Kansas City stock yards, there were but 54; that the average weight was 261 pounds and a fraction over; that the hogs were worth in the market \$6.80 per 100. On cross-examination by counsel for defendant below, the witness stated that he received most of the hogs the day before he shipped them; that he had asked for a car, and, when it was sent, found it was a large 33-foot car, and that his stock would not all be in time to ship that day; that there were a few hogs he expected that did not come, and, finding that he had engaged a large car, he contracted for more hogs to come in the next morning; that he had on his books

the names of parties who brought in hogs each day, the number and price paid, and there were 53 hogs came in on the first day; that he separated the hogs in the evening, and there were no other hogs in the yard at the time; that there were two yards in the north side of the shute, and he put a part in the north side, a part in the southwest corner in the south side, and cut out two little ones that he got in by themselves; . . . that the next morning he let them all by together, and found he had 53 in the yard; that he received there, between that and loading time (referring to his books), 5 from Witters, 1 from Jones, 5 from McKinnagar, and 5 from Dresser, making 16 that morning, and making 69 hogs in all. In answer to the question, "When did you find out there was a shortage in your hogs?" the witness answered: "At that time they [the plaintiffs] were operating mostly on the B. & M. [Burlington & Missouri R. R.] and had their headquarters with Mr. Lincoln at Salem. All returns were made to Mr. Lincoln at that time, and it was two or three days before he was down at Salem, and when he went there Mr. Lincoln showed him the bill. It was two or three days after the shipment." He further testified, on cross-examination, in an answer to "*Question*. What do you know about the reception of the hogs at Kansas City,—who received them? *Answer*. A. J. Gillispie is the man we consigned them to; he received them. *Q*. He is a commission merchant? *A*. Yes. *Q*. You consigned the hogs to him? *A*. Yes. *Q*. Did he make any report to you? *A*. Why, he was not aware until we got the sale bill, and notified him that there was a shortage in the hogs. *Q*. What sale bill do you mean? *A*. The bill we received from him for the sale of the hogs in the yard. *Q*. He could have got no information from the contract as to the number; that was 'one carload of hogs?' *A*. Yes; one carload. The agent did not count the hogs, and did not give it in the bill. *Q*. What did you say? *A*. I say at that time the Mo. Pacific agent did not count the hogs. He told me he was not required to do so, for that reason; there was no number stated in the bill,—just one car of stock. *Q*. Then Mr. Gillispie received his information from you? *A*. Yes; when we heard from him, and found there was a shortage. *Q*. How long after you received notice from your consignee did you give notice to the railroad company that some hogs were missing? *A*. It was not a great while. It might have been a week,—from three or four days to a week."

John H. Myers, witness for the defendant below, testified that in 1883 he was engaged in running a freight train, as conductor, on the night of May 30, 1883, on the Missouri Pacific Railroad, between Kansas City and Atchison. That he took possession of the train coming from Stella, Richardson county, Neb. He recognized the number of the car in which plaintiff's hogs were

shipped as one of the cars of that train. That he remembered the circumstances from the fact that when there is a shortage they always send back to the conductor for examination. Everything lost in transit they send to the conductor, and ask for a statement of the car and its contents, and its condition. That he was called on for a statement of the facts in regard to this car, and from that fact he remembered the circumstances. Witness further described the different manner of sealing the cars. That it was the duty of the freight train conductor, upon receiving a freight train, to go and look at the cars, and see that they were properly sealed, describing the manner of doing it, and stated that was done in the case of this car. That the doors on both sides were sealed, and the seal intact. That he arrived in Kansas City with the train at about 3 o'clock A.M., being one hour late, and turned the train over to the yardmaster, with all the seals intact.

Frederick H. Mickelwait, witness for the defendant below, testified that on or about May 29, 1883, he was freight conductor on the Missouri Pacific Railroad line between Louisville, Neb., and Hiawatha, Kan.; that he conducted the train having car 4,587, (containing the hogs in question); that he received the car at Stella, and delivered it at Hiawatha; that on receiving it he made an examination of the seals, and found them "O. K.," and that they remained untampered with until he delivered them to the next conductor at Hiawatha, at about 2:45.

On the trial the plaintiffs introduced in evidence the following contract: "Rules and Regulations for the Transportation of Live Stock. Live stock of all kinds at the following estimated weights, first class rates: One horse, mule, or horned animal, 2,000 lbs.; two horses, mules, or horned animals, 3,500 lbs.; three horses, mules, or horned animals, 5,000 lbs.,—each additional animal to be rated at 1,500 lbs.; jacks or stallions, 4,000 lbs. each; calves, hogs, and sheep, each 300 lbs. In case the consignor agrees to save the Missouri Pacific Railway Company from liability for any or all the causes enumerated in the following contract, and also agrees to load, unload, feed, and water and attend the stock himself, etc., as specified therein, the special rates of tariff based on such contract will be given. The said Missouri Pacific Railway Company, as aforesaid, will not assume any liability over one hundred dollars per head on horses and valuable live stock, except by special agreement. For the purpose of taking care of the stock, the owner or men in charge will be passed on the train with it; and all persons thus passed are at their own risk of any personal injury from any cause whatever, and must sign release to that effect, endorsed on contract. Live Stock Contract. No. of Car, 4,587. Initials, Mo. P. Stella Station, May 29, 1883. This agreement, made between the Missouri Pacific Railway Company of the first part, and M. H. Vandeventer of the

second part, witnesseth that whereas, the Missouri Pacific Railway Co., as aforesaid, transports live stock only as per above rules and regulations: now, in consideration that the said party of the first part will transport for the said party on the second part one car load of hogs to Kansas City Station, at the rate of 37 dollars per car load, the same being a special rate, lower than the regular rates mentioned in their tariff, the said party of the second part hereby releases the said party of the first part from the liability of a common carrier in the transportation of said stock, and agrees that such liability shall be only that of a private carrier for hire, and from any liability for any delay in shipping said stock after the delivery thereof to the agent of said party of the first part, or for any delay in receiving the same after being tendered to said agent. And the said party of the second part hereby accepts for such transportation the cars provided by said first party, and used for the shipment of said stock, and hereby assumes all risk of injury which the animals or either of them may receive in consequence of any of them being wild, unruly, or weak, of maiming each other or themselves, or in consequence of heat or suffocation, or other ill effects of being crowded in the cars, or on account of being injured by the burning of hay, straw, or other material used by the owner for feeding the stock or otherwise, and all risk of damage that may be sustained by reason of any delay in such transportation, and all risk of escape or robbery of any portion of said stock, or of loss or damage from any other cause or thing, not resulting from the wilful negligence of the agents of the party of the first part. And said party of the second part further agrees that he will load, unload, and reload said stock at his own risk, and feed, water, and attend to the same at his own expense and risk, while it is in the stock yards of the party of the first part, awaiting shipment, and while on the cars, or at feeding or transfer points, or where it may be unloaded for any purpose. And it is further agreed that said party of the second part will see that said stock is securely placed in the cars furnished, and that the cars are safely and properly fastened, so as to prevent the escape of the stock therefrom. And it is further agreed that, in case the said party of the first part shall furnish laborers to assist in loading and unloading said stock at any point, they shall be subject to the orders and deemed the employes of the said party of the second part while so assisting. And, for the consideration before mentioned, said party of the second part further agrees that, as a condition precedent to the right to recover any damages for any loss or injury to said stock, he will give notice in writing of his claim therefor to some officer of said party of the first part, or its nearest station agent, before said stock is removed from the place of destination above mentioned, or from the place of delivery of the same to said party of

the second part, and before said stock is mingled with other stock. And the said party of the second part, in consideration as aforesaid, further agrees that in case of total loss the sum of one hundred dollars per head shall be taken and deemed as liquidated damages for such loss, and in case of injury or partial loss damage shall be measured in the same proportion. This contract does not entitle the holder or other parties to ride in the cars of any train, except the train in which his stock referred to herein is drawn or taken. Neither does it entitle him (and the party of the second part named in this contract so expressly stipulates, admits, and agrees) to return passage from ——— to ———, unless this said contract is presented within 5 days from the date hereof. Nor does it entitle any person except the party of the second part, and parties who accompany him in charge of said stock for the purpose of assisting him in taking care of them as specified in and upon this contract (and does not include women, infants, or other persons unable to do and perform the services required, as expressed in this contract) to return passage within the said 5 days; the object, purpose, and intent of the return pass being to enable the said party of the second part hereto, or his men in charge as expressed in contract, and no other person, to return to ——— thereon, at any time within 5 days from date hereof, and not thereafter. And it is further stipulated and agreed between the parties hereto that, in case the live stock mentioned herein is to be transported over the road or roads of any other railroad company, the said party of the first part shall be released from any liability of every kind after said live stock shall have left its road, and the party of the second part hereby so expressly stipulates and agrees; the understanding of both parties hereto being that the party of the first part shall not be held or deemed liable for anything beyond the line of the Missouri Pacific Railroad Company, excepting to protect the through rate of freight named therein. The evidence that the said party of the second part, after a full understanding thereof, assents to all the conditions of the foregoing contract, is his signature hereto. [Signed] F. R. Mason, Agent for the Missouri Pacific Railway Company. M. H. Vandeventer, Shipper.

Under this contract, it is claimed by the plaintiff in error that the defendants in error not having given notice in writing of their claim for reimbursement to some officer of the railroad company, or to its nearest station agent, before the removal of the car load of hogs from its place of destination, or from its place of delivery to the shipper before the stock was mingled with other stock, they have therefore no right of action against said railroad company for a loss of any portion of said hogs. The plaintiff in error cites in support of this 19 Cent. Law J. 164; also Wabash, St. L. & Pac. R. Co. v. Black,

Defendants' contention.

11 Bradw. (Ill.) 465; Dawson v. St. Louis, K. C. & N. R. Co., 76 Mo. 514; and Moore v. Railroad Co., L. R., 10 Ir. 95.

This article and these cases are to the effect that the law governing common carriers, both in England and America, is to-day substantially as laid down by Lord Holt in the year 1703, quoted in the article cited, that "the law charges this person thus entrusted to carry goods against all events but the acts of God and the public enemy;" but that, in the language of Mr. Justice STRONG in the opinion of the supreme court of the United States in the case of Southern Express Co. v. Caldwell, 21 Wall. 264, "Notwithstanding the great rigor with which courts of law have always enforced the obligations assumed by common carriers, and notwithstanding the reluctance with which modifications of that responsibility imposed upon them by public policy have been allowed, it is undoubtedly true that special contracts with their employers limiting their liability are recognized as valid, if in the judgment of the courts they are just and reasonable,—if they are not in conflict with sound legal policy." This opinion, last above cited, was delivered in October, 1874, and scarcely more than substantially followed the earlier ones of York Co. v. Illinois Cent. R. Co., 3 Wall. 107, and New York Cent. R. Co. v. Lockwood, 17 Wall. 357.

Carriers,
liability—
Contracts
limiting.

The present constitution of this State was framed, submitted, and adopted in the year 1875. Section 4, art. 11, of the constitution, provides that "the liability of railroad corporations as common carriers shall never be limited." This clause expresses the supreme law of the State. If we can divine its meaning, then, as to us, the question is settled.

Same—
Constitu-
tional prohi-
bition.

In following that general rule of construction,—to consider the old law and the mischief, in order to arrive at the meaning of a proposed remedy,—we here take the old law as construed by the supreme court of the United States in the above case, and I think the mischief may be assumed to have been the facility with which common carriers were enabled, either by deception or down-right coercion, to induce shippers to waive their rights under the law, and enter into special contracts of shipment; and while I concede, as a general proposition, that the true office of a State constitution is mainly to limit the powers of the legislature, and not to limit the effect of contracts between parties, yet nearly all, and ours especially, contain departures from this rule. There may have been instances of legislative limitation of the liability of railroad corporations as common carriers in some of the States of the Union or in Great Britain. My other engagements have not allowed me to make an exhaustive examination of the question, but I am aware of none, and am quite sure that, if even some such existed, the mischief resulting was not appreciated in this State

sufficiently to have originated the constitutional provision under consideration. So I conclude that the object and intent of the convention in proposing, and of electors in adopting, this provision of the constitution here referred to, was to put it out of the power of railroads as common carriers to limit their liability as such by special agreements with shippers, and thus remove from their officers and agents all temptation to effect said exemption from liability, and the loss and damage to property which might of necessity follow the release of their responsibility and that of their agents therefor. See *Atchison, etc., R. Co. v. Washburn*, 5 Neb. 117, a case which arose under the old constitution, but was heard in this court under the new.

Counsel for plaintiff in error complains of the second instruction given by the court to the jury on the trial. Nos. 1 and 2 are as follows: "(1) The jury are instructed that the defendant is a common carrier as to all property within the scope of its chartered powers, and it cannot by special agreement divest itself of such character, and therefore it is liable for the negligence of its servants. (2) The jury are instructed that the contract in writing declares that it is in consideration of a special rate, and if the jury believe from the evidence that the stock was not shipped on a special rate, but that plaintiffs paid the full regular rates for such service, then the special reservations, exceptions, or limitations sought to be availed of by defendant are without consideration, and the plaintiffs are not bound by the same where they restrict or limit the liability of defendant as a common carrier." Instruction No. 1, falling within the meaning of the constitutional power as above construed, is approved. No. 2, in my opinion, goes too far in favor of the plaintiff in error, as it seems to imply that, had the property been shipped on a special rate, below the regular rate, the plaintiff in error could have availed itself of the special contract to evade its liability as a common carrier, which, as I understand the effect of the constitutional provision, it could not do. No exception having been taken to the giving or the refusal to give other instructions, they will not be further considered.

As to the sixth clause of the shipping contract set forth herein, and especially invoked by the plaintiff in error, if it were conceded that that clause was binding upon the defendant in error, there is an entire want of evidence to bring the case within its provisions. Kansas City, Mo., was the place of destination of the property, within its meaning. The shipper agreed as a condition precedent to his right to recover damages for any loss or injury to stock to give notice in writing of his claim therefor to some officer of the party of the first part, or its nearest station agent, before said stock should be removed from its place of

**Stipulation
for giving
notice—
Special
findings.**

destination above mentioned, or from the place of delivery of the same to the party of the second part, and before such stock is mingled with other stock; and there is an entire lack of evidence, as shown by the bill of exceptions, of the removal of the stock from Kansas City, or of its having been mingled with other stock. As to the special findings of fact, the second interrogatory ought not to have been given to the jury, for the reason that there was no evidence before them from which they could answer it. Had there been such evidence, I agree with counsel that it would have been error on the part of the trial court to refuse to send the jury back at the request of the defendant for the purpose of answering that interrogatory. These interrogatories were submitted at the request of the defendant,—a request which should have been refused as to the second interrogatory. Therefore the refusal of the court to send the jury back for the purpose of answering it was error without prejudice to the plaintiff in error.

As to the evidence of the number of hogs shipped by the plaintiffs, and received from them by the defendant in its car, and the number delivered by it to the consignee of the plaintiffs at Kansas City, the evidence of the number shipped was before the jury, and tended to prove that there were 69 hogs shipped; and, while it must be admitted that had the evidence in regard to the number delivered by the defendant to the consignee of the plaintiffs at Kansas City been objected to by the defendant when offered on the trial, it would have been rejected; but as it was not objected to, and as it tended to prove that but 54 of the said 69 hogs were delivered to the consignee of the plaintiffs, and was apparently considered by the jury in making up their verdict, its competency will not be here considered.

The judgment of the district court is therefore affirmed. The other judges concur.

Limitation of Carrier's Liability—Constitutional and Statutory Prohibition.— See *Gulf, etc., R. Co. v. Trawick*, 30 Am. & Eng. R. R. Cas. 49, note 56.

WESTERN R. CO. OF ALABAMA

v.

LITTLE.

(Alabama Supreme Court, February 28, 1889.)

Carriage of Goods—Limitation of Liability—Termination of Transit.—A stipulation in a bill of lading that the company will not be "liable for damages (either

from fire or other cause) as common carrier, for any article after it has been transported to its place of destination and has been placed in the depot of the company," is intended to fix a period, after the transportation is complete, when the goods pass from the custody of the company as a carrier, to its keeping as a warehouseman, and is reasonable and valid.

APPEAL from Circuit Court, Lee County.

Action by C. E. Little against the Western R. Co. of Alabama, to recover the value of goods destroyed by fire whilst stored in the defendant's depot. The defendant appeals from a judgment for the plaintiff.

George P. Harrison, Jr., for appellant.

W. J. Sanford for appellee.

CLOPTON, J.—The goods to recover the value of which this action is brought by appellee, were transported by defendant, October 9, 1886, from Montgomery to Auburn, Ala., the latter being the place to which they were consigned. They arrived at the point of destination, and were stored in the company's depot, by 11 o'clock of the same day. During the night of the next day the depot was burned, and the goods destroyed. The bill of lading under which they were shipped contained a stipulation that the company will not "hold themselves liable for damages (either from fire or other cause) as common carriers for any article after it has been transported to its place of destination, and been placed in the depot of the company." The court, though holding that the stipulation is not opposed to public policy, also held that it did not operate to terminate the company's responsibility as carrier until plaintiff had been allowed a reasonable time to remove the goods after their arrival and storage.

In *Louisville & Nashville R. Co. v. Oden*, 80 Ala. 38, we ruled that a special contract by which the company's liability as a common carrier was terminated on the arrival of the freight at the depot, and the failure of the consignee to receive and remove it as soon as ready for delivery, without notice, was unjust and unreasonable; but pretermitted an expression of opinion (a decision of the question not being required by the case) whether a railroad company may, by special contract, terminate its liability as carrier at a time earlier than that fixed by law for its continuance. The question is now directly presented, both by demurrer to pleas and instructions to the jury. Appellee contends that the provision in the bill of lading comes within the rule which forbids a common carrier to contract for exemption from liability for damages caused by his own negligence. We do not so interpret the stipulation. It does not purport to release the company from any risk whatever, ordinary or extraordinary, attached by law to the employment of a com-

mon carrier while the goods are in transit. The intention and effect are to fix a period after the transportation is complete when the goods pass from the custody of the company as a carrier to their keeping as warehousemen.

The principles involved, and on which the solution of the question now coming before the court for the first time depends, are neither new nor difficult. They have been heretofore considered and settled in analogous cases. It has been held that in the case of a carrier by water the general rule governing the delivery of the goods may be varied by contract, or by a reasonable, well established, and generally known local custom, constituting an implied term of the contract of shipment. *Huston v. Peters*, 1 Metc. (Ky.) 558. Former decisions of this

Limitation
of liability
as to
delivery—
Analogous
cases.

court can be maintained only on the ground that a railroad company may, by special contract, or the usages of the business, govern the manner of delivering freight, and the period, after the transportation is complete, at which their responsibility as a carrier ceases. In *South & North Ala. R. Co. v. Wood*, 66 Ala. 167, the corn received for transportation was consigned to a "flag station," where the company had neither agent nor depot of which the consignee was informed. The car containing the corn was placed on a side track at the station. It was held that railroad companies, not being required by law to construct a warehouse or depot at every station on its line, and the consignee being advised at the time of the shipment that there is no agent or depot, and that the exigencies of the business do not require the company to keep an agent or depot at the station to which the goods are consigned, there is an implied consent that the carrier's responsibility shall cease on delivery of the goods according to the reasonable and proper usage of the business; and that the liability as a carrier terminated with the safe delivery of the car on the side track and that there was no assumption of liability as warehousemen. It is said: "We can see no reason why a railroad company acting as a common carrier cannot stipulate by a contract, express or implied, that their liability as a carrier shall terminate with a delivery at a particular point, and that they will assume no liability as warehousemen." As to stations where there are agents or depots, it is remarked that the rule governing the liability of railroad companies, whether as carriers or warehousemen, is correctly stated in *Alabama & T. R. R. Co. v. Kidd*, 35 Ala. 209. In the case last mentioned the contract of the company was to deliver the goods to their own agent. It was held that by the contract of shipment the company impliedly agreed to act as consignee of the owner, and imposed upon themselves, not only the duty of safely carrying to the place of destination, but also of keeping the goods after their arrival, until called for by

the owner. For the performance of the former duty they were responsible as carriers, and for the discharge of the latter, as warehousemen. It is said: "If we do not adopt this construction then the duties of the company were precisely the same as if the cotton had been consigned to the owner himself, and no special purpose was either designed or accomplished by making the agent of the company the consignee." The decision rests on the principle that a railroad company may contract for the cessation of their responsibility by a delivery to their own agent; that is, to themselves. In *Buckley v. Great Western R. Co.*, 18 Mich. 121, where it was ruled that, in the absence of usage, special circumstances, or agreement, the liability of railroad companies for goods in warehouse awaiting delivery is that of common carrier, the court said; "The course to be pursued by the carrier to shield himself from further responsibility in his quality of carrier, where the transportation is accomplished, is not the subject of abstract law, disconnected from the surrounding circumstances, but is a matter depending upon contract, and to be determined by reference to the express stipulations of the parties, or the varying facts from which, when presented, the law will infer the rights, duties, and obligations of the parties." There is no incompatibility in a railroad company being both carrier and

**Railroad
liability as
carrier and
warehouse-
man.**

warehouseman, but cannot have custody in both capacities of the same property at the same time. Neither is there any inconsistency in passing goods from themselves as carriers to themselves as warehousemen.

By the settled rule in this State, though the railroad company continues responsible as a common carrier after the goods have been transported to their place of destination, and stored in the depot, until the consignee or owner has had reasonable opportunity to remove them, when a reasonable time has elapsed, they become, by operation of law, warehousemen; the law, by its own operation, passes the goods from them as carrier to them as warehousemen. There can be no sufficient reason why the consignor and the company may not stipulate that the former waive the goods remaining in store a reasonable time, and that the company's responsibility as carrier shall cease on storing them in their depot, and thereafter become liable as warehousemen.

The courts of many other States, and doubtful if not the weight of authority, maintain the rule that from the necessary manner in which the business of railroad companies is conducted, and from their custom to have platforms on which to place, and warehouses or depots in which to store goods carried, the company discharges its whole duty as a carrier when it stores the goods in the warehouse or depot, to keep until called for, if the consignee or owner is not there to receive them; and that such delivery from themselves as common carriers to themselves as keepers for hire termi-

nates their responsibility as common carriers; that in such case the company ceases to be a common carrier on the completion of the duty of transportation, as matter of law, and assumes as matter of fact, the character of warehousemen. *Rice v. Hart*, 118 Mass. 201; *Gashweiler v. Wabash, St. L. & Pac. R. Co.*, 83 Mo. 112, 25 Am. & Eng. R. R. Cas. 403; *Rothschild v. Michigan Cent. R. Co.*, 69 Ill. 164; *McCarty v. New York etc. R. Co.*, 30 Pa. St. 247; *Mohr v. Chicago & N. W. R. Co.*, 40 Iowa 580; *Butler v. East Tenn. & V. R. Co.*, 8 Lea (Tenn.) 32; 9 Am. & Eng. R. R. Cas. 249. This rule certainly has the merit of being definite, and easy of application. Certainly a stipulation which terminates the company's responsibility as carrier on the completion of the transportation and storage of the goods in the depot—a contractual regulation of the place, time, and manner of delivery, substituting a rule sustained by courts of the highest authority for the rule established in this State—cannot be regarded as opposed to law or public policy. By the terms of the bill of lading, the defendant's responsibility as a common carrier terminated when the goods were transported to Auburn, and safely stored in the depot. The liability thereafter was that of a warehouseman.

We are unable to discover the relevancy of the evidence as to the agent's habits, unless connected with evidence showing such notoriety that knowledge of the company may be inferred, or showing some casual connection between his habits and the destruction of the goods. The same observation applies to the evidence of the bad character of the servant employed at the depot, without stating in what respects it is bad, so as to show its relevancy. The statement of the agent to McElhaney was also inadmissible. It did not relate in any way whatever to the fire, or to the goods of plaintiff, and was but a narrative of a past event.

Reversed and remanded.

Carriers of Goods—Contracts—Limiting Liability.—See note, 35 Am. & Eng. R. R. Cas. 672; 2 Am. & Eng. Encyc. of L. 818.

INMAN

v.

SOUTH CAROLINA R. CO.

(129 U. S. 128.)

Carriage of Goods—Insurance—Subrogation of Carrier.—In an action to recover for goods lost in transit, the defendant cannot take advantage of a clause in a bill of lading, that in the event of loss or damage whilst the goods are in course

of transportation by any of the contracting companies, "the company incurring such liability shall have the benefit of any insurance" which may have been effected, unless it appears that the owner of the goods wrongfully refused to allow the carrier the benefit of an insurance which he had at the time of the loss, and which could be made available to the carrier, or which, before bringing a suit against the company, the defendant collected without condition.

Same—Action Against Carrier—Agreement Between Insurer and Insured.—A policy of insurance issued to a cotton merchant provided that the insurance company should be subrogated to the claim of the insured against the carrier to the extent of any loss or damage, paid, or incurred by the insurance company. The cotton merchant shipped a quantity of cotton for carriage by different connecting carriers under a bill of lading which stipulated that any carrier incurring liability for loss or damage should have the benefit of any insurance upon the goods. After a loss had been incurred, the insurance company signed a memorandum by which the face of the insurance was reinstated, proofs of loss waived and provision made for postponing the question of indemnity until the owners, if the carrier refused to pay, had used efforts to collect, without prejudice to the owner's claim against the insurance company. *Held*, in an action by the owner against the carrier, that the carrier was not entitled to plead in bar that it had not received the benefit of the insurance.

ERROR to Circuit Court of the United States for the District of South Carolina.

William H. Inman, John H. Inman, James Swann, Bernard S. Clark and Robert W. Inman, copartners in business under the firm name of Inman, Swann & Company, brought suit against the South Carolina Railway Company, in the Circuit Court of the United States for the District of South Carolina, on the 18th of July, 1884, to recover damages for the loss of two hundred and forty-eight bales of cotton (out of 809 bales), which the defendant, as a common carrier, had received at Columbia, South Carolina, to be safely carried for certain freight money to Charleston in that State, and there delivered to a connecting carrier to be transported to New York, and which, the plaintiffs averred, the defendant did not safely carry and deliver, but which were, while in the defendant's possession, custody and control as a common carrier, "by the carelessness and negligence of the defendant, its officers, agents and servants, destroyed by fire."

In its answer the defendant admitted the shipment, names of shippers, place of shipment and number of bales shipped; and averred "that at the date of the receipt and shipment of said cotton, bills of lading were given therefor, in which were stated the conditions, stipulations and agreements upon which said cotton should be carried by the railroad company receiving it, and by the connecting roads, which bills of lading and the conditions, stipulations and agreements thereof, were received and accepted by the plaintiffs, and constitute the contract between them and the defendant;" that the cotton was received "subject to the conditions, stipulations and agreements of said bills of lading," and that the two hundred and forty-eight bales were destroyed by fire;

but denied, as a first offence, the allegations in respect to negligence; and, as a second defence, stated "that among other stipulations and agreements in said bills of lading under which said cotton so destroyed by fire was carried is the following, to-wit: 'And it is further stipulated and agreed that in case of any loss or damage done to or sustained by any cotton herein receipted for during transportation, whereby any legal liability may be incurred by the terms of this contract, that the company alone shall be held responsible therefor in whose actual custody the cotton may be at the time of the happening of such loss or damage, and the company incurring such liability shall have the benefit of any insurance which may have been effected upon or on account of said cotton;' that the plaintiffs had fully insured said cotton so destroyed by fire, in solvent companies, from risks, among which fire was one, and that at the time of the occurrence of said fire said cotton was fully covered by insurance: but that this defendant has not had the benefit of such insurance; nor have the plaintiffs given or offered to give it the benefit of such insurance."

The bill of exceptions states that the plaintiffs, to maintain the issue on their part, examined Bernard S. Clark (one of the plaintiffs), who proved the delivery of the cotton to the Greenville and Columbia Railroad, to be carried to the plaintiffs at New York, the receipt of the cotton by the defendant as a connecting carrier, its destruction by fire at Charleston, on the 29th day of October, A.D. 1883, while in the custody of the defendant, awaiting delivery to the next connecting carrier, and that the value of the cotton, less freight, was \$10,717.21; that the form of the bills of lading given to the agent of the plaintiffs by the Greenville and Columbia Railroad Company, the first carrier, was as set out, and contained the clause above quoted.

Upon examination by defendant, the witness testified that plaintiffs had open policies of insurance in the Phoenix, Mechanics' and Traders' and Greenwich Insurance Companies, but had not received any money for the loss occasioned by the burning of the cotton in question; that the insurance companies had signed certain memoranda which witness produced; that witness instructed Mr. Gallagher, an insurance adjuster at Charleston, to bring suit if defendant did not pay; that witness did not know that Gallagher represented the above named insurance companies, but he had said there would be no expense to plaintiffs; that "by our policies, in case of loss, we have to pay four per cent. on that loss, to keep our policy good for twenty thousand dollars all the time. My object is to get this money from the railroad companies and save this four per cent.; and \$150 average comes in there, and in case I don't get it from them to fall back on my insurers—the insurance companies—and make them pay it. That is the ex-

act reason, and if I don't get it from them the idea is that I will fall back on the insurance company." On re-direct examination the witness testified that the plaintiffs were the owners of the cotton, and did not authorize their agent to take bill of lading with insurance clause, but plaintiffs had received the balance of the cotton and settled for the freight on it under the same bill of lading; that the agent "had authority to take bills of lading for the cotton, but had to accept what the company would give him or no bill of lading."

The policy issued to plaintiffs by the Mechanics' and Traders' Insurance Company on cotton burned, bears date 7th September, 1883, and contains the following provisions:

"It is also agreed and understood, that, in case of loss or damage under this policy, the assured, in accepting payment therefor, hereby, and by that act assigns and transfers to the said insurance company all his or their right to claim for loss or damage as against the carrier or other person or persons, to inure to their benefit, however, to the extent only of the amount of the loss or damage and attendant expenses of recovery paid or incurred by the said insurance company; and any act of the insured waiving or transferring or tending to defeat or decrease any such claim against the carrier or such other person or persons, whether before or after the insurance was made under this policy, shall be a cancellation of the liability of the said insurance company for or on account of the risk insured for which loss is claimed. . . . In event of loss the assured agrees to subrogate to the insurers all their claims against the transporters of said cotton, not exceeding the amount paid by said insurers."

Similar provisions are contained in the policy issued by the Greenwich Company to the plaintiffs on cotton destroyed. The policy issued by the Phoenix Insurance Company on said cotton contained the following provision: "In case of any agreement or act, past or future, by the insured, whereby any right of recovery of the insured against any persons or corporations is released or lost, which would, on acceptance of abandonment or payment of loss by this company, belong to this company but for such agreement or act, or, in case this insurance is made for the benefit of any carrier or bailee of the property insured other than the person named as insured, the company shall not be bound to pay any loss, but its right to retain or recover the premium shall not be affected;" also the further provision "that in event of loss the insured agrees to subrogate to the insurers all their claims against the transporters of said cotton, not exceeding the amount paid by said insurers."

The memoranda referred to as signed by the insurance companies on the dates named are as follows:

"NEW YORK, Nov. 17, 1883.

"To Inman, Swann & Co. :

"In accordance with the provisions of this policy the estimated loss sustained by this company of \$3,667 in consequence of fire at Charleston, S. C., about Oct. 29th, '83, is hereby reinstated and \$114.90 additional premium is charged by this company therefor, it being fully understood and agreed that when the above loss is finally adjusted the amount reinstated and the premium charged shall be made correct.

"Attached to this policy, 21,773."

"NEW YORK, Dec. 1st, 1883.

"It is hereby understood and agreed by the undersigned companies insuring Messrs. Inman, Swann & Co., that proofs of loss by fire at Charleston, S. C., of Oct. 29th, 1883, presented this day, are to be considered as filed on November 17th, as all papers and vouchers to prove such loss were forwarded by Messrs. Inman, Swann & Co., with their consent, to the South Carolina R. R. Co. to collect loss from them as common carriers, which, however, is not to prejudice Messrs. Inman, Swann & Co.'s claim against the undersigned insurance companies."

"NEW YORK, Jan. 18th, 1884.

"The undersigned companies having been notified by Messrs. Inman, Swann & Co. of loss by fire at Charleston, S. C., on or about Oct. 29th, '83, and proofs of loss having been presented to the South Carolina R. R. Co. direct, on Nov. 17th, '83, with consent of said insurance companies, which, however, it was agreed upon should not prejudice the assurer's claim against them, the claims having been agreed upon as filed with insurance companies on said Nov. 17th, in case the railroad should refuse to pay and the claim being due on Jan. 17th, 1884, Messrs. Inman, Swann & Co. will still use every effort to collect the claim direct, and the undersigned insurance companies hereby agree to pay them (six) 6 per cent. interest from January 17th, '84, to the time when claim is collected. This agreement, however, is not to prejudice their claim against the undersigned insurance companies."

It was conceded upon the argument that the bills of lading were dated October 18th, October 24th, October 25th and October 27th, 1883, and were signed for the Columbia and Greenville Railroad Company and the companies constituting the through line, of which defendant was one, "separately but not jointly ;" and that the policies of insurance were dated August 29th, September 6th and September 7th, 1883, and expired August 29th, 1884, and contained these clauses: "The total amount of each and every loss, less \$150 to be deducted in lieu of average, shall be paid within thirty days after receipt of proofs of loss;" and "that in the event of loss, the assured agree to pay the insurers

additional premium or premiums at the rate of four per cent. on the amount of such loss or losses, and this policy is thereby to be reinstated and in force to the full amount of \$20,000, unless either party desire the cancelment of the same."

At the request of the defendant and subject to plaintiff's exceptions the court gave to the jury the following instructions:

"First. That the bill or bills of lading under which the cotton of plaintiffs in this case was transported by the defendant constituted the contract of the parties, and the plaintiffs are bound by the stipulation that the defendant company 'shall have the benefit of any insurance that may have been effected upon or on account of said cotton.'

"Second. That the plaintiffs, before they can recover against defendant here, must show that they have performed their part of this contract by proving that they have given to the South Carolina Railway Company the benefit of the insurance, or that they have been ready to perform their contract by tendering such benefit, and that the same has been refused.

"Third. That if the jury find that an agreement was made between plaintiffs and their insurers by which the insurers waived proofs of loss and admitted the claim of plaintiffs to be due by them on the 1st of January, 1884, and plaintiffs agreed to give time upon said claim to the insurers and meantime to press the claim for the cotton against the South Carolina Railway Company, defendant, in consideration of the payment to plaintiffs by their insurers of six per cent. interest per annum on said admitted claim from 1st January, 1884, then plaintiffs cannot recover, and verdict must be for defendant."

The plaintiffs requested the following instructions, which the court refused, and plaintiffs excepted.

"First. That the stipulations in the bills of lading giving the defendant the benefit of insurance effected by the plaintiffs is unreasonable, contrary to public policy, and the duties and obligations imposed by law upon carriers, and therefore void.

"Second. That if the stipulation in the bills of lading under which the cotton of the plaintiffs was to be transported by the defendant giving to the carrier the benefit of insurance, is valid, then such stipulation only entitles the defendant to such insurance upon payment by it of plaintiffs' loss, unless the plaintiffs have already been paid by the insurer.

"Third. That if the stipulation in the bills of lading under which plaintiffs' cotton was to be transported by the defendant giving to the carrier the benefit of plaintiffs' insurance is valid, then such stipulation only entitles the defendant to such insurance as it is in the hands of the plaintiffs, and if the policy is void or unproductive this is no defence, and the plaintiffs are entitled to recover in this action.

"Fourth. That if the stipulation in the bills of lading under which plaintiffs' cotton was to be transported by the defendant giving the carrier benefit of insurance effected by plaintiffs is valid, then no legal obligation arose therefrom that the plaintiffs should effect valid insurance, and if such insurance is invalid this is no defence to plaintiffs' action.

"Fifth. That as the plaintiffs, under the stipulation in the bills of lading giving the carrier benefit of the insurance, may or may not have insured as they please, the defendant takes such insurance, if effected, subject to all infirmities, and the same constitutes no defence to plaintiffs' action.

"Sixth. That the carrier does not lose his character as carrier by reason of a stipulation giving him the benefit of insurance by the shipper or owner, and that as carrier he is primarily liable for loss or damage, if not arising from causes exempted by law or his contract, and if the defendant desires the benefit of plaintiffs' insurance it must first pay the loss sustained by them.

"Seventh. That the defendants, under the bills of lading in question, are not exempt from loss by fire, as such exemption, under said bills of lading, only applies to the carrier by water."

George A. Black for plaintiffs in error.

William Allen Butler and *Theodore G. Barker* for defendant in error.

FULLER, C. J.—The defendant, a corporation of South Carolina, received the cotton in question for safe carriage from the point of connection with the Columbia & Greenville R. Co., to Charleston, S. C., and delivery to the steamship company at that port. The loss occurred by fire, in Charleston, before the obligation was discharged, and this is an action as on the case, based on defendant's breach of duty, as a common carrier, in failing to safely carry and deliver. Case stated.

To secure care, diligence and fidelity in the discharge of his important public functions, the common law charged the common carrier as an insurer; but the rigor of the rule has been relaxed so as to allow reasonable limitations upon responsibility at all events, to be imposed by contract. We have, however, uniformly held, that this concession to changed conditions of business cannot be extended so far as to permit the carrier to exempt himself, by a contract with the owner of the goods, from liability for his own negligence. And as in case of loss the presumption is against the carrier, and no attempt was made here to rebut that presumption, the defendant's liability because in fault must be assumed upon the evidence before us. Presumption against defendant.

The cause went to judgment, however, in favor of the defendant upon its second defence, which was sustained by the rulings

of the circuit court brought under review upon this writ of error.

That defence set up the clause in the bills of lading providing that "the company incurring such liability shall have the benefit of any insurance which may have been effected upon or on account of said cotton;" and it was averred that the plaintiffs had fully insured the cotton against the risk of fire, but that defendant had not had the benefit of such insurance, nor had the plaintiffs given or offered to give to it such benefit.

If this bill of lading had contained a provision that the railroad company would not be liable unless the owners should insure for its benefit, such provision could not be sustained; for that would be to allow the carrier to decline the discharge of its duties and obligations as such, unless furnished with indemnity against the consequences of failure in such discharge. Refusal by the owners to enter into a contract so worded would furnish no defence to an action to compel the company to carry, and submission to such a requisition would be presumed to be the result of duress of circumstances, and not binding. But the clause in question bears no such construction, and obviously cannot be relied on as in itself absolving the company from liability, for by its terms the benefit of insurance was only to be had when a legal liability had been incurred, and in favor of "the company incurring such liability." Since the right to the benefit of insurance at all depended upon the maintenance of plaintiffs' cause of action, the fact of not receiving such benefit could not be put forward in denial of the truth or validity of their complaint.

If, on the other hand, the contention of the defendant may be regarded as in the nature of a counterclaim by way of recoupment or set-off, then the question arises as to the extent of the stipulation, assuming it to be otherwise valid, and what would amount to a breach of it.

By its terms the plaintiffs were not compelled to insure for the benefit of the railroad company; but if they had insurance at the time of the loss, which they could make available to the carrier, or which, before bringing suit against the company, they had collected, without condition, then, if they had wrongfully refused to allow the carrier the benefit of the insurance, such a counterclaim might be sustained, but otherwise not.

The policies here were all taken out some weeks before the shipments were made, although, of course, they did not attach until then, and recovery upon neither of them could have been had, except upon condition of resort over against the carrier, any act of the owners to defeat which operated to cancel the liability of the insurers. They could not, therefore, be made available for the benefit of the carrier. Nor have the insurance companies paid the owners. It is true that after the loss had been incurred,

the companies signed certain memoranda, by which the face of the insurance was reinstated, proofs of loss waived, and provision made for postponing the question of indemnity until the owners, if the carrier refused to pay, had used effort to collect, without prejudice to the owners' claims against the insurance companies. But this falls far short of the equivalent of payment, and, indeed, under the terms of these policies, payment itself would have been subject to such conditions as the companies chose to impose. Although in the order of ultimate liability, that of the carrier is in legal effect primary and that of the insurer secondary, yet the insured can, in the absence of provisions otherwise controlling the subject, insist upon proceeding, under his contract, first, against the party secondarily liable, and when he does so is bound in conscience to give to the latter the benefit of the remedy against the party principal; but these insurers could, under their contracts, require the owners to pursue the carrier in the first instance and decline to indemnify them until the question and the measure of the latter's liability were determined. This they did, and to their action in that regard the defendant is not so situated as to be entitled to object.

Action
against
carrier—
Agreements
between
insured
and insurer.

In our judgment the second defence, in any aspect in which it may be considered upon this record, cannot be maintained, and it follows that the action of the circuit court was erroneous.

The judgment will be reversed, and the cause remanded, with directions to the circuit court to award a new trial.

Carriage of Goods—Insurance—Subrogation.—See 2 Am. & Eng. Encyc. of L. 837; *Platt v. Richmond*, Y. R. & C. R. Co., 32 Am. & Eng. R. R. Cas. 517; *Jackson Co. v. Boylston Ins. Co.*, 21 Ib. 117, note 120, *Ins. Co. of North America v. Easton*, *post*; *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.*, *Co.*, *post*.

INSURANCE COMPANY OF NORTH AMERICA

v.

EASTON *et al.*

(*Texas Supreme Court, March 1, 1889.*)

Carriage of Goods—Insurance—Subrogation of Carrier—Warranty Against—Validity.—A warranty in a policy of insurance which provides that the insurance shall not inure to the benefit of any carrier, is a valid and lawful stipulation, and is not in restraint of trade or contrary to public policy, and a subsequent agreement between the insured and the carrier that the latter shall be subrogated to the right of the insured avoids the policy.

Same—Notice to Carrier—Necessity of.—The fact that the carrier had no notice of a clause in insurance policy providing that the insurance should not inure to his benefit, does not render it contrary to public policy to permit the insurance company to rely upon the warranty even though the carrier has stipulated that he shall have the benefit of any insurance effected by the shipper.

Same—Demand for—Condition of Contract.—A refusal to give the carrier the benefit of an insurance already secured is in effect but a refusal to insure for the benefit of the carrier, and the carrier cannot insist upon the right thereto as a condition on which he shall receive and transport freight.

APPEAL from District Court, Galveston County.

Action by Nelson S. Easton and others, receivers of the Houston Central R. Co., against the Insurance Co. of North America, to recover the amount of a loss under a policy effected by Callender & Magnus, upon certain cotton which was lost in transit upon the defendant's road. The defendant appeals from a judgment for the plaintiffs.

Hume & Kleberg for appellant.

Willie, Mott & Ballinger for appellees.

STAYTON, C. J.—This case comes before us on an agreed statement, made from the record, and signed by counsel, which is as follows:

On the 22d day of June, 1885, appellant, a corporation having its domicile in the State of Pennsylvania, issued an open policy to Callender & Magnus, cotton buyers, residing in New York city. This policy was renewed September 1, 1886, for one year, subject to certain conditions and the following express warranty: "Warranted that this insurance shall not inure to the benefit of any carrier." Under the terms of the open policy all cotton purchased by Callender & Magnus, or by their agents for them, in the United States, was at once covered by the same as soon as purchased, they reporting as soon as practicable to the insurance company the particulars of the purchase, as to marks, value, amount of insurance desired, etc. The insurance company would then issue to Callender & Magnus a certificate of insurance, giving date from which insurance began, number of bales insured, amount of insurance, locality of cotton, and its intended route of shipment. But the insurance as such was complete under the said open policy as soon as the cotton was purchased, even before the certificate was issued; the certificate being only a statement giving the details of the particular transaction, such as value, amount insured, and route of shipment, but without in any manner altering or modifying the terms and conditions of the open policy, or the conditions and warranty contained in the aforesaid renewal thereof. The purpose of an open policy is convenience to the assured, and to insure his property from the very moment of its acquisition. This could not be done if he was required to make a separate con-

Agreed
statement
of case.

tract for each lot of cotton which he may purchase in different parts of the country. The danger and risk which would necessarily intervene after the purchase is made until insurance could be effected by special policy would have to be borne by the owner. Upon the open policy, however, the owner is protected by the insurance upon all purchases, no matter where and when made, and though loss should occur before report of the purchase to the insurer, or issuance of the certificate of insurance. Premiums under the policy in this case were payable monthly upon amounts insured thereunder for that period.

On the 9th day of December, 1886, Callender & Magnus, by one of their agents, bought and became the owners of 50 bales of cotton at Mexia, Tex. The advice of this purchase reached the office of the appellant insurance company some time thereafter, and said company, on the 16th of said month, issued to Callender & Magnus a certificate of insurance. The certificate provides that it represented and took the place of the policy, and conveyed all the rights of the original policy-holder (for the purpose of collecting any loss or claim) as fully as if the property was covered by a special policy direct to the holder of the certificate, and the certificate was dated New York, December 16, 1886.

On the 11th day of December, 1886, Callender & Magnus, by their agents, delivered to appellees, who are common carriers, at the town of Mexia, Tex., to be shipped to Liverpool, Eng., the said 50 bales of cotton, and on the same day appellees delivered to the said agents of Callender & Magnus a bill of lading containing, among other things, the following provision: "In case of any loss, detriment, or damage done to, or sustained by, any of the property herein receipted for during such transportation, whereby any legal liability shall or may be incurred, that company alone shall be answerable therefor in whose actual custody the same be at the time of the happening of such loss, detriment, or damage, and the carrier so liable shall have full benefit of any insurance that may have been effected upon or on account of said cotton." On the 12th day of December, 1886, while said cotton was in the custody of the appellees in their capacity as common carriers, 40 bales thereof, of the value of \$1,725.34, were totally destroyed by fire. The appellant was notified of the destruction of the cotton December 21, 1886. When the appellant issued the certificate of insurance to Callender & Magnus it had no notice or knowledge of that clause in the bill of lading which provides that the carrier of said cotton shall have the benefit of any insurance which may have been effected upon or on account of said cotton. The fact that said clause was contained in said bill of lading was first brought to the knowledge of appellant when the bill of lading was presented to it, as one of the proofs of loss required, some time after the 21st of Decem-

ber, 1886. Appellees had no actual notice of the warranty in the policy stipulating that the insurance should not inure to the benefit of any carrier, and, being liable for the loss of the cotton as common carriers, paid the same, whereupon Callender & Magnus transferred to them the certificate of insurance. Appellant declined to pay the policy to Callender & Magnus because the same had been forfeited by their acceptance of the bill of lading. Appellant declining to pay for the loss, appellees on the 27th of September, 1887, sued it in the district court of Galveston county. That court held the clause in the policy providing that the instrument shall not inure to the benefit of any carrier to be void because in restraint of trade, and against public policy, and rendered judgment for appellees for \$1,725.34. From this judgment the Insurance Company of North America appeals, and the following questions of law, embraced in the assignments of error, are now by agreement respectfully submitted to this court for its decision: (1) Is the warranty in the policy, which provides that the insurance shall not inure to the benefit of any carrier, a valid and lawful stipulation in the contract of insurance, and does a violation thereof forfeit the policy, or is said warranty in restraint of trade and contrary to public policy? (2) Under the particular facts of this case, irrespective of any rights which Callender & Magnus may have had under the contract of insurance; can appellees under the law recover against the appellant?

It must now be held that so much of the clause in the bill of lading as provided that "the carrier so liable shall have full benefit of any insurance that may have been effected upon or on account of said cotton," is not invalid by reason of its contravening any rule based on public policy. **Condition subrogating carrier is valid.** *British & F. M. Ins. Co. v. Gulf C. & S. F. R. Co.*, 63 Tex. 475; 21 Am. & Eng. R. R. Cas. 112; *Phoenix Ins. Co. of Brooklyn v. Erie & W. Trans. Co.*, 117 U. S. 312; *Inman v. South Carolina R. Co.*, 9 Sup. Ct. Rep. 249; *Rintoul v. New York Cent. & H. R. Co.*, 17 Fed. Rep. 905; 16 Am. & Eng. R. R. Cas. 114; *Platt v. Richmond, Y. R. & C. R. Co.*, 15 N. E. Rep. 393; 32 Am. & Eng. R. R. Cas. 517; *Jackson Co. v. Boylston Mut. Ins. Co.*, 139 Mass. 508. In the case first referred to the bill of lading was prior in point of time to the policy, which recited the fact of shipment, and it was held that this was sufficient evidence that the policy was issued, with notice of the right secured by the carrier by contract, and in subordination to that right. The same ruling was made in the second case cited, in which it is assumed that the contracts of carriage and insurance were made simultaneously, the insurer being ignorant of the clause in the bill of lading which subrogated the carrier to the rights of shipper under the policy. In disposing of the case the court said: "The policy containing no express stipulation upon

the subject, and there being no evidence of any fraudulent concealment or misrepresentation by the owner in obtaining the insurance, the existence of the stipulation between the owner and the carrier would have afforded no defence to an action on the policy, according to the careful judgments rendered in June last, and independently of each other,—the one by the English court of appeal, and the other by the supreme judicial court of Massachusetts. *Tate v. Hyslop*, L. R., 15 Q. B. Div. 368; *Jackson Co. v. Boylston Mut. Ins. Co.*, 139 Mass. 508."

In *Inman v. South Carolina R. Co.* it appeared that the policy issued some time before the shipment was made, and, while recognizing the validity of a contract between the shipper and carrier, whereby the latter should become entitled to the benefit of insurance made by the former in a proper case, the court said: "The policies here were all taken out some weeks before the shipments were made, although, of course, they did not attach until then, and recovery upon neither of them could have been had, except upon condition of resort over against the carrier, any act of the owners to defeat which operated to cancel the liability of the insurers. They could not, therefore, be made available for the benefit of the carrier."

In *Jackson Co. v. Boylston Mut. Ins. Co.* it was assumed that the carrier might contract for the benefit of insurance secured by the shipper, and the inference to be drawn from the report of the case is that the policy, made the basis of the action, was issued after the right of the carrier to the benefit of insurance had attached. The shipper bought through a broker, who it seems did not read the receipts securing to the carrier the benefit of insurance. The railroad's receipt, with draft attached was forwarded by the broker to the shipper, the draft cashed, notice given to the insurance company of the shipments, and the policy presented, that the shipment might be evidenced thereon, which was done. This seems to have been the act which applied the insurance to the cotton destroyed while in transit, and no enquiry was made as to the terms of shipment when insurance was thus obtained. In disposing of the case the court said: "That the contract between the plaintiff and the carrier was binding and valid being conceded, we are brought to the conclusion expressed in the ruling of the judge who presided at the trial, 'that in a case where there was no intention to deprive the insurance company of its rights, and no intentional fraud and concealment, and where the plaintiff (shipper) was actually ignorant of the stipulation relied on at the time it made the insurance or obtained the endorsement on the policy, and was ignorant, when it ordered the cotton, that any such stipulation would be made, and there was no actual misrepresentation, an insurance company insuring property *in transitu*, making no provision in regard to the nature

of the contract of carriage, and not requesting to see the bill of lading or receipt, and making no enquiries about them, must be held to have insured it under and subject to the actual contract of carriage, so far as it was a lawful contract." Under this state of facts it was held that the carrier, by virtue of its contract, became subrogated to all rights held by the shipper against the insurer; and that thus was defeated the right of the insurer to be subrogated, on payment of the loss, to the right against the carrier, to which, but for the contract of shipment, the insurer, under the settled principles of law, would have been entitled. This case, while holding that the right of the insured, when dependent only on his relation to the carrier, to modify by contract the rule of subrogation, cannot be questioned, concedes that no contract made between the insured and the insurer, whereby the right to modify the general rule of subrogation is withdrawn from the insured, can be controlled by a contract between the insured and the carrier.

In *Mercantile Mut. Ins. Co. v. Calebs*, 20 N. Y. 175, it was held that a contract between a carrier and shipper, substantially such as is set up in this case, was valid; and on payment of a loss under a policy issued after the contract for carriage was made the right of subrogation was denied to the insurer. In disposing of the case the court said: "It is argued that this clause in the contract did not exempt the carriers from liability to the plaintiffs, because it was made without their knowledge or consent, and was an attempted fraud upon their rights. But this is not so in point of fact, so far as the defendants are concerned. The contract between them and the insured was made before any insurance was obtained; and though it sought to secure a right to the defendants in case policies were procured, yet on their part no fraud was contemplated on the plaintiffs,—none is found by the court. It is true the case states that the plaintiffs did not know of the contract when they issued their policies. That was a matter between them and the insured. If there was any fraudulent concealment of facts on the part of the latter at the time they obtained their insurances, it would have avoided the policies, and they would not have been bound to pay the loss. If they paid it voluntarily, they are not entitled to be subrogated." In this case, as in the others, but one, considered, there was no contract between the insured and insurer, at the time the contract between the carrier and the insured was made, which restrained them from modifying or entirely annulling the ordinary rule of subrogation if they saw proper to do so by contract.

The cases referred to hold: (1) That contracts, such as contained in the carrier's contract before us, are valid as between the carrier and shipper. (2) That a policy issued with knowledge that the insured property is in transit, in the absence of enquiry

as to the terms of shipment, misrepresentation as to this or other matter material to the risk, or fraud will be deemed to have been issued in subordination to the contract of shipment, which may control the right of the insurer to subrogation. None of them, however, hold that a contract of insurance, existing when a contract of carriage is made, whether the carrier have knowledge of the insurance contract or not, can be controlled by a subsequent contract between the insured and the carrier, and the insurer's right to subrogation thus be destroyed, even when there is no express provision in the policy which forbids this. It must be that, in the absence of stipulation in a policy to the contrary, the insured may, without invalidating his policy, make such contracts with a carrier, limiting the liability of the latter, as may be lawful under the laws in force at the place of shipment, or such other laws as may be applicable; for the parties ought to be presumed to contract with reference to the right of the carrier to refuse to receive and transport freight without contract, limiting his liability in so far as this may lawfully be done under the law governing the shipment. With the carrier's liability lawfully restricted by contract, a loss resulting from a cause within the restriction would not give right of action in favor of the insured shipper against the carrier; and where this is the case there can be no subrogation under the general principles applicable to the subject.

**Rules
deductible
from
decisions.**

The contract relied on by the carrier in this case was not one it had the right to have made, or otherwise the right to refuse to receive the cotton for transportation; and it ought not to be presumed that the parties to the insurance contract contemplated that the affreightment would be made practically at the entire risk of the insurer, when the carrier had no right to insist that this should be so, and when the general rules of law, with reference to which they ought to be presumed to have contracted, fix on the carrier the ultimate liability for a loss occurring while the freight is in his hands, unless the loss arises from a clause that relieves the carrier from liability. The carrier's liability is held to be the ultimate liability, simply because the loss of property, while in his custody as carrier, results in fact or in legal contemplation from his failure of duty, while that of the insurer is held to be that only of an indemnitor, in all cases in which the insurance contract does not stipulate to the contrary, or in which a contrary instruction may not fairly be inferred from the time and circumstances of the contract.

**Carrier has
no right to
insist on
subrogation.**

It seems to us, under the facts of this case, leaving out of consideration the warranty contained in the contract of insurance, that the right of the insurer to subrogation on payment of the

loss is as well secured when there is not, as well as when there is, an express contract that the right to subrogation shall exist; and that a contract between the insured and the carrier which defeats this right would defeat the right of the insured or the carrier to recover at all upon the contract of insurance. It has been held that, where a policy expressly gives the insurer the right to subrogation against the carrier, a subsequent agreement between the insured and the carrier that the latter shall be subrogated to the right of the insured avoids the policy. *Carstairs v. Mechanics' & Traders' Ins. Co. of New York*, 18 Fed. Rep. 473. The correctness of this ruling was recognized in *Jackson Co. v. Boylston Mut. Ins. Co.*, 139 Mass. 511. If the insured wishes insurance that will place the ultimate liability on the insurer, let him so make his contract as to protect the carrier afterwards to be selected by him; compensate the insurer for the increased risk of ultimate loss; and be in position to contract with the carrier for reduction in freight, such as may be proper by reason of this shifting of the ultimate risk of loss from the carrier to the insurer.

Passing from this, however, it is certainly true that the insured could not confer on the carrier a right he did not possess. The warranty which the insurance company seeks to assert to avoid liability to the carrier was one promissory in character, in which the parties contracted "that this insurance shall not inure to the benefit of any carrier." This, if a valid provision, cuts off any construction of the policy whereby it could possibly be held to confer any right to benefit under it on a carrier of the property insured, and it deprives the insured of the power to confer on such carrier any right to benefit under the policy by contract or otherwise. By the warranty we understand the parties to have contracted that the contract of insurance should be avoided—should cease to be operative—if during the time specified for its continuance the insured should so contract with a carrier of the property insured as, between themselves, to give to the carrier any right to benefit under the policy. The purpose of this provision evidently was to deny, in terms, to the insured the right of power to confer on the carrier any right to benefit through the policy, such as the cases to which we have referred hold may be conferred on the carrier by contract with the shipper made before insurance is obtained. The insurer, in effect, says in the face of the policy,—and to this the insured assents: "This contract shall be binding on me only so long as you refrain from contracting with any carrier you may employ to transport the insured property that he shall have right to any indemnity from me for loss occurring, while the property is in his possession as

carrier, from a cause, which, under the rules of law applicable to the contract of carriage, would give you cause of action against such carrier; and I will not be longer bound by this contract if you in any manner release such carrier from that full liability to you and to me which will exist under a lawful contract of affreightment for loss of the insured property while in his hands as carrier." By requiring the carrier's liability to continue the ultimate liability, the insurer doubtless intended to make the carrier's own interest some guaranty against its own negligence or misconduct. In the very act of making the contract through which the carrier in this case claims, the policy ceased to be of any effect whatever, as to the particular cotton at least, and from that time forward neither the insured nor the carrier could assert a right under it based on the particular loss, if the warranty was valid.

The court below held that the warranty was invalid, because in restriction of trade, and against public policy. The insurance company was under no legal obligation to issue a policy at all, but, if it did, it had the right to place a **Warranty is not invalid.** provision in the policy such as it did, and in so doing it neither contravened any public policy nor restrained trade. It is said that the carrier had no notice of the clause in the policy now relied upon, and that for this reason it would be contrary to public policy to permit it now to rely upon the warranty. The law does not require that notice shall be given to third persons of contracts of insurance, nor does it provide a mode in which such notice may be given whereby all persons will be bound. If the want of notice of a contract becomes important in a contest between a party to it and a third person, who has sought to acquire by contract an interest or right antagonistic to the right the former contract gives, it is not because the former contract was illegal, but because some equitable consideration has arisen on account of which the person who has kept secret his right ought not to be permitted to assert it against one whom he has misled by his silence. If the mere want of notice of contracts would place them on the list of contracts condemned because contrary to public policy, then there would be a long list of condemned contracts, not heretofore even suspected of illegality. The carrier knew that no right could be acquired against the insurer through a contract with the insured other than the latter possessed and had power to convey, and if it desired to know the extent of that right it was its duty to enquire. Appellee makes this enquiry: "Could the insurance company and the owner of the cotton, without the knowledge or the privity of the carrier, make a contract between themselves by which the carrier would be deprived of its well recognized legal rights? Is not such a restriction against public policy, and in restraint of trade?" Neither the knowledge of nor privity of the carrier to the insurance con-

tract was necessary to its legality. The carrier had no legal right, recognized or unrecognized, to have the insurance company or the insured to make any contract of insurance whatever, much less to make one the insurance company was under no obligation to make, and had refused to make. The terms of the policy neither restrained appellee nor any other carrier from making lawful [contracts for carriage at any place, nor from carrying them out anywhere; they simply denied to the insured the right to make a contract which would bind the insurer as the carrier desired it to be bound.

Two further enquiries and suggestions are made by appellee: "Then, knowing the law,—knowing that the carrier had the right to stipulate for the benefit of any insurance that may have been effected,—knowing that the shipper could not refuse to accept from the carrier a bill of lading with that provision,—will appellant be permitted to receive premiums, and at the same time insert a clause in its policy of insurance which would exonerate it from the payment of any loss?" "Appellant refused to pay the policy to Callender & Magnus because the same had been forfeited by their acceptance of the bill of lading. This excuse might have had some force if they had any option, but it was the law of Texas and the United States that the carrier had the right to issue such a bill of lading. Callender & Magnus had no right to refuse to receive it." Appellant, corporation though it is, is affected with knowledge of the law; but admitting this, we think it cannot be charged with knowledge that the propositions here made are the law. It knew that the carrier might stipulate for the benefit of such insurance as the insured had the power and right to convey; but it did not know that the insured and carrier might make a contract for it without its consent, and contrary to the express stipulation of the policy. We think it did not know that the shipper had not the right to reject the bill of lading on which appellee now bases its right, containing the clause in regard to insurance; for we understand it was the right of the shipper to reject that bill of lading, and to have their cotton transported on one that did not contain that provision. A refusal to give the carrier the benefit of insurance already secured, would be in effect, but a refusal to insure for the benefit of the carrier, and this a carrier cannot require as a condition on which it will receive and transport freight. If there be any question of unearned premium, it is not presented in this case. The policy having ceased to be operative, and that being the foundation of all obligation on the part of the insurance company, the certificates subsequently issued, and transferred subsequently to the loss, conferred no right on the carrier.

**Right of
insurer to
insist on
warranty.**

The judgment of the court below will be reversed, and judgment here rendered for appellant. It is so ordered.

Carriage of Goods—Insurance—Subrogation.—See *Inman v. South Carolina R. Co.*, *ante*, p. 663, and note.

LIVERPOOL AND GREAT WESTERN STEAM CO.

v.

PHENIX INSURANCE CO.

(129 U. S. 397.)

Common Carrier—Ocean Steamer—General Cargo.—The owner of an ocean steamer regularly trading between two ports and carrying a general cargo for hire, is a common carrier with the liability of an insurer against loss.

Same—Limitation of Liability—Negligence—Validity.—A clause in the bill of lading by which a common carrier attempts to exempt itself from all responsibility for loss or damage by perils of the seas arising from the negligence of the master and crew, is invalid.

Same—Conflict of Laws—Federal and State Courts.—A stipulation in a bill of lading made at a port in the United States by which a common carrier attempts to exempt itself from the negligence of its servant, will be held to be invalid by the courts of the United States, notwithstanding the fact that its validity is recognized by the *lex loci contractus*.

Same—General Maritime Law.—There is no general maritime law in force in the United States which recognizes the validity of a stipulation by a common carrier that it shall be exempt from liability for the negligence of its servants.

Same—Foreign Law—Necessity of Pleading.—In an action against a common carrier, the courts will not take cognizance of the law of Great Britain that common carriers can exempt themselves by express contract for losses occasioned by negligence of their servants, unless the party relying thereon has properly pleaded and proved such rule of law.

Same—Bill of Lading—Construction—Lex Loci Contractus.—A bill of lading made and dated at New York signed by the ship's agent there, which contains no indication that the owners of the steamship are English, and which declares that general average is to be computed according to the international rules, is governed by the law enforced in the United States, although it is to be performed on board of a British vessel and to be finally completed in Great Britain and the damage out of which the cause of action arises, occurred in Great Britain.

Same—Stipulation Limiting Liability—Connecting Carriers.—When a contract is made for the carriage of goods partly by rail and partly by vessel, and a stipulation that a carrier liable for loss or damage shall have full benefit of any insurance that may have been effected upon the goods is inserted in the midst of the terms and conditions defining the liability of the railroad companies, and is omitted in those defining the liability of the steamship company, the latter company can claim no benefit therefrom.

Same—Subrogation of Insurance—Assignment—Admiralty.—An insurer, upon paying to the insured the amount of a loss, total or partial, of goods insured, becomes without any formal assignment, or express stipulation in the policy subrogated to a corresponding extent to the insured's right of action against the carrier, and in a court of admiralty, may assert in his name that right of the shipper.

APPEAL from the Circuit Court of the United States for the Eastern District of New York.

F. A. Wilcox and *S. P. Nash* for appellant.

Wm. Allen Butler for appellee.

GRAY, J.—This is an appeal by a steamship company from a decree rendered against it upon a libel in admiralty, “in a cause of action arising from breach of contract,” brought by an insurance company, claiming to be subrogated to the rights of the owners of goods shipped on board the *Montana*, one of the appellant’s steamships, at New York, to be carried to Liverpool, and lost or damaged by her stranding, because of the negligence of her master and officers, in Holyhead bay, on the coast of Wales, before reaching her destination. In behalf of the appellant, it was contended that the loss was caused by perils of the sea, without any negligence on the part of master and officers; that the appellant was not a common carrier; that it was exempt from liability by the terms of the bills of lading; and that the libellant had not been subrogated to the rights of the owners of the goods.

It is to be remembered that the jurisdiction of this court to review the decree below is limited to questions of law, and does not extend to questions of fact. Act Feb. 16, 1875, c. 77, § 1, 18 St. 315; *The Gazelle*, 128 U. S. 474, 484, and cases there cited. In the findings of fact the circuit court, after stating, in much detail, the course of the ship’s voyage, the conduct of her master and officers, the position and character of the various lighthouses and other safeguards which she passed, and other attendant circumstances immediately preceding the stranding, distinctly finds as facts: “Those in charge of the navigation of the *Montana* were negligent, in that, without having taken cross-bearings of the light at South Stack, and so determined their distance from the light, they took an east three-quarters south course before passing the Skerries, and without seeing the Skerries light; and in that they continued at full speed after hearing the fog-gun at North Stack; and in that they took a northeast by east magnetic course on hearing said fog-gun, instead of stopping and backing and taking a westerly course out of Holyhead bay; and in that they did not ascertain their position in Holyhead bay by means of the lights and fog-signals, or by the use of the lead, or by stopping until they should, by those means or otherwise, learn where their ship was.” “On the foregoing facts,” the only conclusion of law stated by the circuit court (except those affecting the right of subrogation and the amount to be recovered) is in these words: “The stranding of the *Montana*, and the consequent damage to her cargo, having

been the direct result of the negligence of the master and officers of the steamer, the respondent is liable therefor." Negligence is not here stated as a conclusion of law, but assumed as a fact already found. The conclusion of law is, in effect, that, such being the fact, the respondent is liable, notwithstanding any clause in the bills of lading.

The question of negligence is fully and satisfactorily discussed in the opinion of the district court reported in 17 Fed. Rep. 377, and in that of the circuit court, reported in 22 Blatchf. 372. It is largely, if not wholly, a question of fact, the decision of which by the circuit court cannot be reviewed here; and so far as it can possibly be held to be or to involve a question of law, it is sufficient to say that the circumstances of the case, as found by the circuit court, clearly warrant, if they do not require, a court or jury, charged with the duty of determining issues of fact, to find that the stranding was owing to the negligence of the officers of the ship.

The contention that the appellant is not a common carrier may also be shortly disposed of. By the settled law, in the absence of some valid agreement to the contrary, the owner of a general ship, carrying goods for hire, whether employed in internal, in coasting, or in foreign commerce, is a common carrier, with the liability of an insurer against all losses, except only from such irresistible causes as the act of God and public enemies. Moll.

**Defendant
held to be a
common
carrier.**

De J. Mar. bk. 2, c. 2, § 2; 2 Bac. Abr. "Carrier," A; Barclay v. Cucullay Gana, 3 Doug. 389; 2 Kent, Comm. 598, 599; Story, Bailm. § 501; The Niagara, 21 How. 7, 23; The Lady Pike, 21 Wall. 1, 14. In the present case the circuit court has found as facts: "The Montana was an ocean steamer, built of iron, and performed regular service as common carrier of merchandise and passengers between the ports of Liverpool, England, and New York, in the line commonly known as the 'Guion Line.' By her and by other ships in that line, the respondent was such common carrier. On March 2, 1880, the Montana left the port of New York, on one of her regular voyages, bound for Liverpool, England, with a full cargo, consisting of about twenty-four hundred tons of merchandise, and with passengers." The bills of lading, annexed to the answer and to the findings of fact, show that the four shipments in question amounted to less than 130 tons, or hardly more than one-twentieth part of the whole cargo. It is clear, therefore, upon this record, that the appellant is a common carrier, and liable as such, unless exempted by some clause in the bills of lading. In each of the bills of lading, the excepted perils, for loss or damage from which it is stipulated that the appellant shall not be responsible, include "barratry of master or mariners," and all perils of the seas, rivers, or navigation, described more par-

ticularly in one of the bills of lading as "collision, stranding, or other peril of the seas, rivers, or navigation, of whatever nature or kind soever, and howsoever such collision, stranding, or other peril may be caused," and in the other three bills of lading described more generally as any "accidents of the seas, rivers, and steam navigation, of whatever nature or kind soever;" and each bill of lading adds, in the following words in the one, and in equivalent words in the others, "whether arising from the negligence, default, or error in judgment of the master, mariners, engineers, or others of the crew, or otherwise howsoever." If the bills of lading had not contained the clause last quoted, it is quite clear that the other clauses would not have relieved the appellant from liability for the damage to the goods from the stranding of the ship through the negligence of her officers. Collision or stranding is, doubtless, a peril of the seas; and a policy of insurance against perils of the seas covers a loss by stranding or collision, although arising from the negligence of the master or crew, because the insurer assumes to indemnify the assured against losses from particular perils, and the assured does not warrant that his servants shall use due care to avoid them. *General Mutual Ins. Co. v. Sherwood*, 14 Haw. 351, 364, 365; *Orient Mut. Ins. Co. v. Adams*, 123 U. S. 67, 73; *Copeland v. New England Marine Ins. Co.*, 2 Metc. 432, 448-450. But the ordinary contract of a carrier does involve an obligation on his part to use due care and skill in navigating the vessel and carrying the goods: and, as is everywhere held, an exception, in the bill of lading, of perils of the sea or other specified perils does not excuse him from that obligation, or exempt him from liability for loss or damage from one of those perils to which the negligence of himself or servants has contributed. *New Jersey Steam Navigation Co. v. Bank*, 6 How. 344; *U. S. Express Co. v. Kountze*, 8 Wall. 342; *Western Transportation Co. v. Downer*, 11 Wall. 129; *Grill v. Screw Co.*, L. R. 1 C. P. 600; *The Xantho*, L. R. 12 App. Cas. 503, 510, 515.

We are then brought to the consideration of the principal question in the case, namely, the validity and effect of that clause

<p>Carrier cannot stipulate for exemption from liability for negligence.</p>	<p>in each bill of lading by which the appellant undertook to exempt itself from all responsibility for loss or damage by perils of the sea, arising from negligence of the master and crew of the ship. This question appears to us to be substantially determined by the judgment of this court in <i>New York Cent. R. Co. v. Lockwood</i>, 17 Wall. 357. That case, indeed differed in its facts from the case at bar. It was an action brought against a railroad corporation by a drover who, while being carried with his cattle on one of its trains under an agreement which it had required him to sign, and by which he was to pay certain rates for the carriage of the cattle, to pass free himself, and</p>
---	---

to take the risks of all injuries to himself or to them, was injured by the negligence of the defendant or its servants. The judgment for the plaintiff, however, was not rested upon the form of the agreement, or upon any difference between railroad corporations and other carriers, or between carriers by land and carriers by sea, or between carriers of passengers and carriers of goods, but upon the broad ground that no public carrier is permitted by law to stipulate for an exemption from the consequences of the negligence of himself or his servants. The very question there at issue, defined at the beginning of the opinion as "whether a railroad company, carrying passengers for hire, can lawfully stipulate not to be answerable for their own or their servants' negligence in reference to such carriage," was stated a little further on in more general terms as "the question before propounded, namely, whether common carriers may excuse themselves from liability for negligence;" and a negative answer to the question thus stated was a necessary link in the logical chain of conclusions announced at the end of the opinion as constituting the *ratio decidendi*. 17 Wall. 359, 363, 384. The course of reasoning, supported by elaborate argument and illustration, and by copious references to authorities, by which those conclusions were reached, may be summed up as follows:

By the common law of England and America before the declaration of independence, recognized by the weight of English authority for half a century afterwards, and upheld by decisions of the highest courts of many States of the Union, common carriers could not stipulate for immunity for their own or their servants' negligence. The English railway and canal traffic act of 1854, declaring void all notices and conditions made by those classes of common carriers, except such as should be held by the court or judge before whom the case should be tried to be just and reasonable, was substantially a return to the rule of the common law. The only important modification by the congress of the United States of the previously existing law on this subject is the act of 1851, to limit the liability of ship owners (act March 3, 1851, c. 43, 9 St. 635; Rev. St., §§ 4282-4289), and that act leaves them liable without limit for their own negligence, and liable to the extent of the ship and freight for the negligence or misconduct of the master and crew. The employment of a common carrier is a public one, charging him with the duty of accommodating the public in the line of his employment. A common carrier is such by virtue of his occupation, not by virtue of the responsibilities under which he rests. Even if the extent of those responsibilities is restricted by law or by contract, the nature of his occupation makes him a common carrier still. A common carrier may become a private carrier, or a bailee for hire, when, as a matter of accommodation or special engagement, he under-

takes to carry something which it is not his business to carry. But when a carrier has a regularly established business for carrying all or certain articles, and especially if that carrier is a corporation created for the purpose of the carrying trade, and the carriage of the articles is embraced within the scope of its chartered powers, it is a common carrier, and a special contract about its responsibility does not divest it of that character. The fundamental principle upon which the law of common carriers was established was to secure the utmost care and diligence in the performance of their duties. That end was effected in regard to goods, by charging the common carrier as an insurer, and in regard to passengers, by exacting the highest degree of carefulness and diligence. A carrier who stipulates not to be bound to the exercise of care and diligence seeks to put off the essential duties of his employment. Nor can those duties be waived in respect to his agents or servants, especially where the carrier is an artificial being, incapable of acting except by agents and servants. The law demands of the carrier carefulness and diligence in performing the service; not merely an abstract carefulness and diligence in proprietors and stockholders who take no active part in the business. To admit such a distinction in the law of common carriers, as the business is now carried on, would be subversive of the very object of the law. The carrier and his customer do not stand upon a footing of equality. The individual customer has no real freedom of choice. He cannot afford to higgie or stand out, and seek redress in the courts. He prefers rather to accept any bill of lading, or to sign any paper, that the carrier presents, and in most cases he has no alternative but to do this, or to abandon his business. Special contracts between the carrier and the customer, the terms of which are just and reasonable, and not contrary to public policy, are upheld; such as those exempting the carrier from responsibility for losses happening from accident, or from dangers of navigation that no human skill or diligence can guard against; or for money or other valuable articles, liable to be stolen or damaged, unless informed of their character or value; or for perishable articles or live animals, when injured without default or negligence of the carrier. But the law does not allow a public carrier to abandon altogether his obligations to the public, and to stipulate for exemptions which are unreasonable and improper, amounting to an abnegation of the essential duties of his employment. It being against the policy of the law to allow stipulations which will relieve the railroad company from the exercise of care or diligence, or which, in other words, will excuse it for negligence in the performance of its duty, the company remains liable for such negligence. This analysis of the opinion in *New York Cent. R. Co. v. Lockwood* shows that it affirms and rests upon the doctrine that an express stipulation by

any common carrier for hire, in a contract of carriage, that he shall be exempt from liability for losses caused by the negligence of himself or his servants, is unreasonable and contrary to public policy, and consequently void. And such has always been the understanding of this court, expressed in several later cases. *Southern Express Co. v. Caldwell*, 21 Wall. 264, 268; *Ogdensburg etc. R. Co. v. Pratt*, 22 Wall. 123, 134; *Bank of Kentucky v. Adams Express Co.*, 93 U. S. 174, 183; *Grand Trunk R. of Can. v. Stevens*, 95 U. S. 655; *Hart v. Pennsylvania R. Co.*, 112 U. S. 331, 338; *Phoenix Ins. Co. of Brooklyn v. Erie & Western Transportation Co.*, 117 U. S. 312, 322; *Inman v. South Carolina R. Co.*, 129 U. S. 128.

The general doctrine is nowhere stated more explicitly than in *Hart v. Pennsylvania R. Co.* and *Phoenix Ins. Co. of Brooklyn v. Erie & Western Transportation Co.*, just cited, and there does not appear to us to be anything in the decision or opinion in either of those cases which supports the appellant's position. In the one case, a contract fairly made between a railroad company and the owner of the goods, and signed by the latter, by which he was to pay a rate of freight based on the condition that the company assumed liability only to the extent of an agreed valuation of the goods, even in case of loss or damage by its negligence, was upheld as just and reasonable, because a proper and lawful mode of securing a due proportion between the amount for which the carrier might be responsible and the compensation which he received, and of protecting himself against extravagant or fanciful valuations, which is quite different from exempting himself from all responsibility whatever for the negligence of himself and his servants. In the other, the decision was that, as a common carrier might lawfully obtain from a third person insurance on the goods carried against loss by the usual perils, though occasioned by negligence of the carrier's servants, a stipulation in a bill of lading that the carrier, when liable for the loss, should have the benefit of any insurance effected on the goods, was valid as between the carrier and the shipper, even when the negligence of the carrier's servants was the cause of the loss. Upholding an agreement by which the carrier receives the benefit of any insurance obtained by the shipper from a third person is quite different from permitting the carrier to compel the shipper to obtain insurance, or to stand his own insurer, against negligence on the part of the carrier.

It was argued for the appellant that the law of New York, the *lex loci contractus*, was settled by recent decisions of the court of appeals of that State in favor of the right of a carrier of goods or passengers, by land or water to stipulate for exemption from all liability for his own negligence. *Mynard v. Syracuse, B. & N. Y. R. Co.*, 71 N. Y. 180; *Spinetti v. Atlas Steamship Co.*, 80 N.

Y. 71. But on this subject, as on any question depending upon mercantile law and not upon local statute or usage, it is well settled that the courts of the United States are not bound by decisions of the courts of the State, but will exercise their own judgment, even when their jurisdiction attaches only by reason of the citizenship of the parties, in an action at law of which the courts of the State have concurrent jurisdiction, and upon a contract made and to be performed within the State. *New York Cent. R. Co. v. Lockwood*, 17 Wall. 357, 368; *Myrick v. Michigan Cent. R. Co.*, 107 U. S. 102, 9 Am. & Eng. R. R. Cas. 25; *Carpenter v. Providence Wash. Ins. Co.*, 16 Pet. 495, 511; *Swift v. Tyson*, Id. 1; *Brooklyn, C. & N. R. Co. v. Nat. Bank*, 102 U. S. 14; *Burgess v. Seligman*, 107 U. S. 20, 33; *Smith v. Alabama*, 124 U. S. 465, 478; *Bucher v. Cheshire R. Co.*, 125 U. S. 555, 583; 34 Am. & Eng. R. R. Cas. 389. The decisions of the State courts certainly cannot be allowed any greater weight in the federal courts when exercising the admiralty and maritime jurisdiction exclusively vested in them by the constitution of the United States.

It was also argued in behalf of the appellant that the validity and effect of this contract, to be performed principally upon the high seas, should be governed by the general maritime law, and that by that law such stipulations are valid. To this argument there are two answers: First. There is not shown to be any such general maritime law. The industry of the learned counsel for the appellant has collected articles of codes, decisions of courts, and opinions of commentators in France, Italy, Germany and Holland, tending to show that, by the law administered in those countries, such a stipulation would be valid. But those decisions and opinions do not appear to have been based on general maritime law, but largely, if not wholly, upon provisions or omissions in the codes of the particular country, and it has been said by many jurists that the law of France, at least, was otherwise. See 2 Pard. Droit Com. No. 542; 4 Goujet & Meyer Dict. Droit Com. (2d Ed.) Voiturier, Nos. 1, 81; 2 Troplong Droit Civil, Nos. 894, 910, 942, and other books cited in *P. & O. Steam Navigation Co. v. Shand*, 3 C. P. Moore, (N. S.) 272, 278, 285, 286; 25 Laurent Droit Civil Francais, No. 532; Mellish, L. J., in *Cohen v. South Eastern R. Co.*, L. R. 2 Exch. Div. 253, 257. Second. The general maritime law is in force in this country, or in any other, so far only as it has been adopted by the laws or usages thereof; and no rule of the general maritime law (if any exists) concerning the validity of such a stipulation as that now before us has ever

Federal courts not bound by decisions of State courts on mercantile questions.

No general maritime law validating stipulations for exemption from liability.

General maritime law in force only so far as it has been adopted by usage.

been adopted in the United States or in England, or recognized in the admiralty courts of either. *The Lottawanna*, 21 Wall. 558; *The Scotland*, 105 U. S. 24, 29, 33; *The Belgenland*, 114 U. S. 355, 369; *The Harrisburg*, 119 U. S. 199; *The Hamburg*, 2 Moore, P. C. (N. S.) 289, 319, Brown & L. 253, 272; *Lloyd v. Guibert*, L. R., 1 Q. B. 115, 123, 124, 6 Best & S. 100, 134, 136; *The Gaetano*, L. R., 7 Prob. Div. 137, 143.

It was argued in this court, as it had been below, that as the contract was to be chiefly performed on board a British vessel, and to be finally completed in Great Britain, and the damage occurred in Great Britain, the case should be determined by the British law, and that by that law the clause exempting the appellant from liability for losses occasioned by the negligence of its servants was valid. The circuit court declined to yield to this argument, upon two grounds: (1) That as the answer expressly admitted the jurisdiction of the circuit court asserted in the libel, and the law of Great Britain had not been set up in the answer nor proved as a fact, the case must be decided according to the law of the federal courts as a question of general commercial law; (2) that there was nothing in the contracts of affreightment to indicate a contracting in view of any other law than the recognized law of such forum in the United States as should have cognizance of suits on the contracts. 22 Blatchf. 397, 22 Fed. Rep. 728.

The law of Great Britain since the declaration of independence is the law of a foreign country, and, like any other foreign law, is matter of fact, which the courts of this country cannot be presumed to be acquainted with, or to have judicial knowledge of, unless it is pleaded and proved. The rule that the courts of one country cannot take cognizance of the law of another without plea and proof has been constantly maintained, at law and in equity, in England and America. *Church v. Hubbard*, 2 Cranch, 187, 236; *Ennis v. Smith*, 14 How. 400, 426, 427; *Dainese v. Hale*, 91 U. S. 13, 20, 21; *Pierce v. Indseth*, 106 U. S. 546; *Ex parte Cridland*, 3 Ves. & B. 94, 99; *Lloyd v. Guibert*, L. R., 1 Q. B. 115, 129. In the case last cited, Mr. Justice WILLES, delivering judgment in the exchequer chamber, said: "In order to preclude all misapprehension, it may be well to add that a party who relies upon a right or an exemption by foreign law is bound to bring such law properly before the court, and to establish it in proof. Otherwise the court, not being entitled to notice such law without judicial proof, must proceed according to the law of England." The decision in *Lamar v. Micou*, 112 U. S. 452, and 114 U. S. 218, did not in the least qualify this rule, but only applied the settled doctrine that the circuit courts of the United States, and this court on appeal from their decisions, take judicial notice of the laws of the several States of the Union as domestic laws; and it

has since been adjudged, in accordance with the general rule as to foreign law, that this court, upon writ of error to the highest court of a State, does not take judicial notice of the law of another State, not proved in that court and made part of the record sent up, unless by the local law that court takes judicial notice of it. *Hanley v. Donoghue*, 116 U. S. 1; *Renaud v. Abbott*, 116 U. S. 277.

The rule is as well established in courts of admiralty as in courts of common law or courts of equity. Chief Justice MARSHALL, delivering judgment in the earliest admiralty appeal in which he took part, said: "That the laws of a foreign nation, designed only for the direction of its own affairs, are not to be noticed by the courts of other countries, unless proved as facts, and that this court, with respect to facts, is limited to the statement made in the court below, cannot be questioned." *Talbot v. Seeman*, 1 Cranch, 1, 38. And in a recent case in admiralty, Mr. Justice BRADLEY said: "If a collision should occur in British waters, at least between British ships, and the injured party should seek relief in our courts, we would administer justice according to the British law, so far as the rights and liabilities of the parties were concerned, provided it were shown what the law was. If not shown, we would apply our own law to the case. In the French or Dutch tribunals they would do the same." *The Scotland*, 105 U. S. 24, 29. So Sir WILLIAM SCOTT, in the high court of admiralty, said: "Upon all principles of common jurisprudence, foreign law is always to be proved as a fact." *Le Louis*, 2 Dod. 210, 241. To the same effect are the judgments of the judicial committee of the privy council in *The Prince George*, 4 Moore, P. C. 21, and *The Peerless*, 13 Moore, P. C. 484. And in a more recent case, cited by the appellant, Sir ROBERT PHILLMORE said: "I have no doubt whatever that those who rely upon the difference between the foreign law and the law of the forum in which the case is brought are bound to establish that difference by competent evidence." *The Duero*, L. R., 2 Adm. & Ecc. 393, 397. It was therefore rightly held by the circuit court, upon the pleadings and proofs upon which the case had been argued, that the question whether the British law differed from our own was not open.

But it appears by the supplemental record, certified to this court in obedience to a writ of *certiorari*, that after the circuit court had delivered its opinion and filed its findings of fact and conclusions of law, and before the entry of a final decree, the appellant moved for leave to amend the answer by averring the existence of the British law, and its applicability to this case, and to prove that law; and that the motion was denied by the circuit court, because the proposed allegation did not set up any fact unknown to the appellant at the time of filing the original answer, and could not be allowed under the rules of that court. 22

Blatchf. 402-404, 22 Fed. Rep. 730. On such a question we should be slow to overrule a decision of the circuit court. But we are not prepared to say that if, upon full consideration, justice should appear to require it, we might not do so, and order the case to be remanded to that court, with directions to allow the answer to be amended and proof of the foreign law to be introduced. *The Adeline*, 9 Cranch, 244, 284; *The Marianna Flora*, 11 Wheat. 1, 38; *The Charles Morgan*, 115 U. S. 69; *Merchants' Mut. Ins. Co. v. Allen*, 121 U. S. 67; *The Gazelle*, 128 U. S. 474. And the question of the effect which the law of Great Britain, if duly alleged and proved, should have upon this case has been fully and ably argued. Under these circumstances, we prefer not to rest our judgment upon technical grounds of pleading or evidence, but, taking the same course as in *Insurance Co. v. Allen*, just cited, proceed to consider the question of the effect of the proof offered, if admitted.

It appears by the cases cited in behalf of the appellant, and is hardly denied by the appellee, that under the existing law of Great Britain, as declared by the latest decisions of her courts, common carriers, by land or sea, except so far as they are controlled by the provisions of the railway and canal traffic act of 1854, are permitted to exempt themselves by express contract from responsibility for losses occasioned by negligence of their servants. *The Duero*, L. R., 2 Adm. & Ecc. 393; *Taubman v. Pacific Co.*, 26 Law T. (N. S.) 704; *Steel v. State Line Steamship Co.*, L. R., 3 App. Cas. 72; *Manchester, S. & L. R. Co. v. Brown*, L. R., 8 App. Cas. 703. It may therefore be assumed that the stipulation now in question, though invalid by our law, would be valid according to the law of Great Britain.

By law of Great Britain carriers may stipulate for exemption from liability for negligence.

The general rule as to what law should prevail, in case of a conflict of laws concerning a private contract, was concisely and exactly stated before the declaration of independence by Lord MANSFIELD (as reported by Sir William Blackstone, who had been of counsel in the case), as follows: "The general rule, established *ex comitate et jure gentium*, is that the place where the contract is made, and not where the action is brought, is to be considered in expounding and enforcing the contract. But this rule admits of an exception, where the parties (at the time of making the contract) had a view to a different kingdom." *Robinson v. Bland*, 1 W. Bl. 234, 256, 258; 2 Burrows, 1077, 1078.

Contracts generally governed by *lex loci contractus*.

The recent decisions by eminent English judges, cited at the bar, so clearly affirm and so strikingly illustrate the rule, as applied to cases more or less resembling the case before us, that a full statement of them will not be inappropriate.

In *P. & O. Steam Navigation Co. v. Shand*, 3 Moore, P.C. (N.S.) 272, 290, Lord Justice TURNER, delivering judgment in the privy council, reversing a decision of the supreme court of

P. & O. Mauritius, said: "The general rule is that the law of
Steam Nav. the country where a contract is made governs as to
Co. v. the nature, the obligation, and the interpretation of it.
Shand. The parties to a contract are either the subjects of the

power there ruling, or as temporary residents owe it a temporary allegiance. In either case, equally, they must be understood to submit to the law there prevailing, and to agree to its action upon their contract. It is, of course, immaterial that such agreement is not expressed in terms. It is equally an agreement in fact, presumed *de jure*, and a foreign court interpreting or enforcing it on any contrary rule defeats the intention of the parties, as well as neglects to observe the recognized comity of nations." It was accordingly held that the law of England, and not the French law in force at Mauritius, governed the validity and construction of a contract made in an English port between an English company and an English subject to carry him thence by way of Alexandria and Suez to Mauritius, and containing a stipulation that the company should not be liable for loss of passengers' baggage, which the court in Mauritius had held to be invalid by the French law. *Id.* 278. Lord Justice TURNER observed that it was a satisfaction to find that the court of cassation in France had pronounced a judgment to the same effect, under precisely similar circumstances, in the case of a French officer taking passage at Hong Kong, an English possession, for Marseilles in France, under a like contract, on a ship of the same company, which was wrecked in the Red sea, owing to the negligence of her master and crew. *Julien v. Oriental Co.*, imperfectly stated in 3 Moore P. C. (N. S.) 282, note, and fully reported in 75 Journal du Palais, 225, (1864).

The case of *Lloyd v. Guibert*, 6 Best & S. 100, L. R., 1 Q. B. 115, decided in the queen's bench before, and in the exchequer chamber after, the decision in the privy council just

Lloyd v. referred to, presented this peculiar state of facts: A
Guibert. French ship owned by Frenchmen was chartered by the master, in pursuance of his general authority as such, in a Danish West India island, to a British subject, who knew her to be French, for a voyage from St. Marc, in Hayti, to Havre, London, or Liverpool, at the charterer's option, and he shipped a cargo from St. Marc to Liverpool. On the voyage, the ship sustained damage from a storm which compelled her to put into a Portuguese port. There the master lawfully borrowed money on bottomry, and repaired the ship, and she carried her cargo safe to Liverpool. The bondholder proceeded in an English court of admiralty against the ship, freight, and cargo, which being in-

sufficient to satisfy the bond, he brought an action at law to recover the deficiency against the owners of the ship; and they abandoned the ship and freight in such a manner as by the French law absolved them from liability. It was held that the French law governed the case, and therefore the plaintiff could not recover. It thus appears that in that case the question of the intent of the parties was complicated with that of the lawful authority of the master; and the decision in the queen's bench was put wholly upon the ground that the extent of his authority to bind the ship, the freight, or the owners was limited by the law of the home port of the ship, of which her flag was sufficient notice. 6 Best & S. 100. That decision was in accordance with an earlier one of Mr. Justice STORY, in *Pope v. Nickerson*, 3 Story, 465, as well as with later ones in the privy council, on appeal from the high court of admiralty, in which the validity of a bottomry bond has been determined by the law prevailing at the home port of the ship, and not by the law of the port where the bond was given. *The Karnak*, L. R., 2 P. C. 505, 512; *The Gætano*, L. R., 7 Prob. Div. 137. See also *The Woodland*, 7 Ben. 110, 118, 14 Blatchf. 499, 503, and 104 U. S. 180.

The judgment in the exchequer chamber in *Lloyd v. Guibert* was put upon somewhat broader ground. Mr. Justice WILLES, in delivering that judgment, said: "It is generally agreed that the law of the place where the contract is made is *prima facie* that which the parties intended, or ought to be presumed to have adopted, as the footing upon which they dealt, and that such law ought therefore to prevail in the absence of circumstances indicating a different intention, as, for instance, that the contract is to be entirely performed elsewhere, or that the subject matter is immovable property situated in another country, and so forth; which latter, though sometimes treated as distinct rules, appear more properly to be classed as exceptions to the more general one, by reason of the circumstances indicating an intention to be bound by a law different from that of the place where the contract is made; which intention is inferred from the subject matter and from the surrounding circumstances, so far as they are relevant to construe and determine the character of the contract." L. R., 1 Q. B. 122, 123, 6 Best & S. 133.

It was accordingly held, conformably to the judgment in *Navigation Co. v. Shand*, above cited, that the law of England, as the law of the place of final performance or port of discharge, did not govern the case, because it was "manifest that what was to be done at Liverpool was but a small portion of the entire service to be rendered, and that the character of the contract cannot be determined thereby," although as to the mode of delivery the usages of Liverpool would govern. L. R., 1 Q. B. 125, 126, 6 Best & S. 137. It was then observed that the law of Portugal, in force

where the bottomry bond was given, could not affect the case; that the law of Hayti had not been mentioned or relied upon in argument; and that, "in favor of the law of Denmark, there is the cardinal fact that the contract was made in Danish territory, and, further, that the first act done towards performance was weighing anchor in a Danish port;" and in was finally, upon a view of all the circumstances of the case, decided that the law of France, to which the ship and her owners belonged, must govern the question at issue. The decision was, in substance, that the presumption that the contract should be governed by the law of Denmark, in force where it was made, was not overcome in favor of the law of England by the fact that the voyage was to an English port and the charterer an Englishman, nor in favor of the law of Portugal by the fact that the bottomry bond was given in a Portuguese port; but that the ordinary presumption was overcome by the consideration that French owners and an English charterer, making a charter-party in the French language of a French ship, in a port where both were foreigners, to be performed partly there by weighing anchor for the port of loading (a place where both parties would also be foreigners), partly at that port by taking the cargo on board, principally on the high seas, and partly by final delivery in the port of discharge, must have intended to look to the law of France as governing the question of the liability of the owner beyond the value of the ship and freight.

In two later cases, in each of which the judgment of the queen's bench division was affirmed by the court of appeal, the law of the place where the contract was made was held to govern, notwithstanding some of the facts strongly pointed towards the application of another law,—in the one case, to the law of the ship's flag; and in the other, to the law of the port where that part of the contract was to be performed, for the nonperformance of which the suit was brought. In the first case the bill of lading, issued in England, in the English language, to an English subject, by a company described therein as an English company, and in fact registered both in England and in Holland, for goods shipped at Singapore, an English port, to be carried to a port in Java, a Dutch possession, in a vessel with a Dutch name, registered in Holland, commanded by a Dutch master, and carrying a Dutch flag, in order to obtain the privilege of trading with Java, was held to be governed by the law of England, and not by that of Holland, in determining the validity and construction of a clause exempting the company from liability for negligence of master and crew; and Lords Justices BRETT and LINDLEY both considered it immaterial whether the ship was regarded as English or Dutch. *Chartered Mercantile Bank of India v. Neth-*

**Chartered
Mercantile
Bank v.
Netherlands
India Steam
Nav. Co.**

erlands India Steam Nav. Co., L. R., 9 Q. B. Div. 118, and L. R., 10 Q. B. Div. 521, 529, 536, 540, 544. As Lord Justice LINDLEY observed: "This conclusion is not at all at variance with Lloyd v. Guibert, but rather in accordance with it. It is true that in that case the law of the flag prevailed; but the intention of the parties was admitted to be the crucial test, and the law of the ship's flag was considered as the law intended by the parties to govern their contract, as there really was no other law which they could reasonably be supposed to have contemplated. The plaintiff there was English; the defendant French; the *lex loci contractus* was Danish; the ship was French; her master was French; and the contract was in the French language. The voyage was from Hayti to Liverpool. The facts here are entirely different, and so is the inference to be deduced from them. The *lex loci contractus* was here English, and ought to prevail unless there is some good ground to the contrary. So far from there being such ground, the inference is very strong that the parties really intended to contract with reference to English law." L. R., 10 Q. B. Div. 540. In the remaining English case, a contract made in London between two English mercantile houses, by which one agreed to sell to the other 20,000 tons of Algerian esparto, to be shipped by a French company at an Algerian port on board vessels furnished by the purchasers at London, and to be paid for by them in London on arrival, was held to be an English contract, governed by English law, notwithstanding that the shipment of the goods in Algiers had been prevented by *vis major*, which, by the law of France in force there, excused the seller from performing the contract. *Jacobs v. Credit Lyonnais*, L. R., 12 Q. B. Div. 589. That result was reached by applying the general rule expressed by DENMAN, J., in these words: "The general rule is that where a contract is made in England between merchants carrying on business here, as this is, but to be performed elsewhere, the construction of the contract, and all its incidents, are to be governed by the law of the country where the contract is made, unless there is something to show that the intention of the parties was that the law of the country where the contract is to be performed should prevail;" and summed up by the court of appeal, consisting of BRETT, M. R., and BOWEN, L. J., as follows: "The broad rule is that the law of a country where a contract is made presumably governs the nature, the obligation, and the interpretation of it, unless the contrary appears to be the express intention of the parties." L. R., 12 Q. B. Div. 596, 597, 600.

Jacobs v.
Credit
Lyonnais.

This court has not heretofore had occasion to consider by what law contracts like those now before us should be expounded. But it has often affirmed and acted on the general rule, that contracts are to be governed, as to their nature, their validity, and their

interpretation, by the law of the place where they were made, unless the contracting parties clearly appear to have had some other

law in view. *Cox v. U. S.*, 6 Pet. 172; *Scudder v. Bank*, 91 U. S. 406; *Pritchard v. Norton*, 106 U. S. 124; *Lamar v. Micou*, 114 U. S. 218; *Watts v. Camors*, 115 U. S. 353, 362. The opinion in *Watts v. Camors*, just cited, may require a word or two of explanation. It was there contested whether, in a charter-party made at New Orleans between an English owner and an American charterer of an English ship, for a voyage from New Orleans to a port on the continent of Europe,

a clause regulating the amount payable in case of any breach of the contract was to be considered as liquidating the damages, or as a penalty only. Such was the question of which the court said that if it depended upon the intent of the parties, and consequently upon the law which they must be presumed to have had in view, they "must be presumed to look to the general maritime law of the two countries, and not to the local law of the State in which the contract was signed." The choice there was not between the American law and the English law, but between the statutes and decisions of the State of Louisiana and a rule of the maritime law common to the United States and England.

Some reliance was placed by the appellant upon the following observations of Mr. Justice STORY, sitting in the circuit court: "If a contract is to be performed partly in one country and partly in another country, it admits of a double aspect, nay, it has a double operation, and is, as to the particular parts, to be interpreted distinctively; that is, according to the laws of the country where the particular parts are to be performed or executed. This would be clearly seen in the case of a bill of lading of goods deliverable in portions or parts at ports in different countries. Indeed, in cases of contracts of affreightment and shipment, it must often happen that the contract looks to different portions of it to be performed in different countries; some portions at the home port, some at the foreign port, and some at the return port." "The goods here were deliverable in Philadelphia; and what would be an effectual delivery thereof, in the sense of the law (which is sometimes a nice question), would, beyond question, be settled by the law of Pennsylvania. But to what extent the owners of the schooner are liable to the shippers for the non-fulfilment of a contract of shipment of the master—whether they incur an absolute or a limited liability—must depend upon the nature and extent of the authority which the owners gave him, and this is to be measured by the law of Massachusetts," where the ship and her owners belonged. *Pope v. Nickerson*, 3 Story, 465, 484, 485. But in that case the last point stated was the only one in judgment; and the previous remarks evi-

dently had regard to such distinct obligations included in the contract of affreightment as are to be performed in a particular port—for instance, what would be an effectual delivery, so as to terminate the liability of the carrier, which, in the absence of express stipulation on that subject, is ordinarily governed by the law or usage of the port of discharge. *Robertson v. Jackson*, 2 C. B. 412; *Lloyd v. Guibert*, L. R., 1 Q. B. Div. 115, 126, 6 Best & S. 100, 137.

In *Morgan v. New Orleans, M. & T. R. Co.*, 2 Woods, 244, a contract made in New York, by a person residing there, with a railroad corporation having its principal office there, but deriving its powers from the laws of other States, for the conveyance of interests in railroad and steamboat lines, the delivery of property, and the building of a railroad in those States, and which, therefore, might be performed partly in New York, and must be performed partly in the other States, was held by Mr. Justice BRADLEY, so far as concerned the right of one party to have the contract rescinded on account of non-performance by the other party, to be governed by the law of New York, and not by either of the diverse laws of the other States in which parts of the contract were to be performed.

In *Hale v. New Jersey Steam Navigation Co.*, 15 Conn., 538, 546, goods were shipped at New York for Providence, in Rhode Island, or Boston, in Massachusetts, on a steamboat employed in the business of transportation between New York and Providence; and an exemption, claimed by the carrier under a public notice, was disallowed by the supreme court of Connecticut, because by the then law of New York the liability of a common carrier could not be limited by such a notice. Chief Justice WILLIAMS, delivering judgment, said: "The question is, by what law is this contract to be governed? The rule upon that subject is well settled, and has been often recognized by this court, that contracts are to be construed according to the laws of the State where made, unless it is presumed from their tenor that they were entered into with a view to the laws of some other State. There is nothing in this case, either from the location of the parties or the nature of the contract, which shows that they could have had any other law in view than that of the place where it was made. Indeed, as the goods were shipped to be transported to Boston or Providence, there would be the most entire uncertainty what was to be the law of the case if any other rule was to prevail. We have therefore no doubt that the law of New York, as to the duties and obligations of common carriers, is to be the law of the case."

In *Dyke v. Erie R. Co.*, 45 N. Y. 113, 117, a passenger traveling upon a ticket by which a railroad corporation, established in New York, and whose road extended from one place to another

in that State, passing through the States of Pennsylvania and New Jersey by their permission, agreed to carry him from one to another place in New York, was injured in Pennsylvania, by the law of which the damages in actions against railroads for personal injury were limited to \$3,000. The court of appeals of New York held that the law of Pennsylvania had no application to the case; and Mr. Justice ALLEN, delivering the opinion, referred to the case of *Navigation Co. v. Shand*, before cited, as analogous in principle, and said: "The contract was single, and the performance one continuous act. The defendant did not undertake for one specific act, in part performance, in one State, and another specific and distinct act in another of the States named, as to which the parties could be presumed to have had in view the laws and usages of distinct places. Whatever was done in Pennsylvania was a part of the single act of transportation from Attica or Waverly, in the State of New York, to the city of New York, and in performance of an obligation assumed and undertaken in this State, and which was indivisible. The obligation was created here, and by force of the laws of this State, and force and effect must be given to it in conformity to the laws of New York. The performance was to commence in New York, and to be fully completed in the same State, but liable to breach, partial or entire, in the States of Pennsylvania and New Jersey, through which the road of the defendant passed, but whether the contract was broken, and if broken the consequences of the breach, should be determined by the laws of this State. It cannot be assumed that the parties intended to subject the contract to the laws of the other States, or that their rights and liabilities should be qualified or varied by any diversities that might exist between the laws of those States and the *lex loci contractus*."

In *McDaniel v. Chicago & N. W. R. Co.*, 24 Iowa, 412, 417, cattle transported by a railroad company from a place in Iowa to a place in Illinois, under a special contract made in Iowa, containing a stipulation that the company should be exempt from liability for any damage, unless resulting from collision or derauling of trains, were injured in Illinois by the negligence of the company's servants; and the supreme court of Iowa, Chief Justice DILLON presiding, held the case to be governed by the law of Iowa, which permitted no common carrier to exempt himself from the liability which would exist in the absence of contract. The court said: "The contract being entire and indivisible, made in Iowa, and to be partly performed here, it must, as to its validity, nature, obligation, and interpretation, be governed by our law. And by our law, so far as it seeks to change the common law, it is wholly nugatory and inoperative. The rights of the parties, then, are to be determined under the common law, the same as if no such contract had been made."

So in *Pennsylvania Co. v. Fairchild*, 69 Ill. 260, where a railroad company received in Indiana goods consigned to Leavenworth, in Kansas, and carried them to Chicago, in Illinois, and there delivered them to another railroad company, in whose custody they were destroyed by fire, the supreme court of Illinois held that the case must be governed by the law of Indiana, by which the first company was not liable for the loss of the goods after they had passed into the custody of the next carrier in the line of transit.

The other cases in the courts of the several States cited at the bar afford no certain or satisfactory guide. Two cases, held not to be governed by a statute of Pennsylvania, providing that no railroad corporation should be liable for a loss of passenger's baggage beyond \$300, unless the excess in value was disclosed and paid for, were decided (whether rightly or not we need not consider) without much reference to authority, and upon their peculiar circumstances—the one case, on the ground that a contract by a New Jersey corporation to carry a passenger and his baggage from a wharf in Philadelphia across the Delaware river, in which the States of Pennsylvania and New Jersey had equal rights of navigation and passage, and thence through the State of New Jersey to Atlantic City, was a contract to be performed in New Jersey and governed by the law of that State (*Brown v. Railroad Co.*, 83 Pa. St. 316); and the other case, on the ground that the baggage received at a town in Pennsylvania, to be carried to New York city, having been lost after its arrival by negligence on the part of the railroad company, the contract, so far as concerned the delivery, was to be governed by the law of New York (*Curtis v. Delaware, L. & W. R. Co.*, 74 N. Y. 116). The suggestion in *Barter v. Wheeler*, 49 N. H. 9, 29, that the question, whether the liability of a railroad corporation for goods transported through parts of two States was that of a common carrier or of a forwarder only, should be governed by the law of the State in which the loss happened, was not necessary to the decision, and appears to be based on a strained inference from the observations of Mr. Justice STORY in *Pope v. Nickerson*, above cited. In a later case, the supreme court of New Hampshire reserved any expression of opinion upon a like question. *Gray v. Jackson*, 51 N. H. 9, 39.

This review of the principal cases demonstrates that, according to the great preponderance, if not the uniform concurrence, of authority, the general rule that the nature, the obligation, and the interpretation of a contract are to be governed by the law of the place where it is made, unless the parties at the time of making it have some other law in view, requires a contract of affreightment, made in one country between citizens or residents thereof, and the performance of which begins there, to be gov-

erned by the law of that country, unless the parties, when entering into the contract, clearly manifest a mutual intention that it shall be governed by the law of some other country.

There does not appear to us to be anything in either of the bills of lading in the present case tending to show that the contracting parties looked to the law of England, or to any other law than that of the place where the contract was made. The bill of lading for the bacon and hams was made and dated at New York, and signed by the ship's agent there. It acknowledges that the goods have been shipped "in and upon the steamship called 'Montana,' now lying in the port of New York, and bound for the port of Liverpool," and are to be delivered at Liverpool. It contains no indication that the owners of the steamship are English, or that their principal place of business is in England, rather than in this country. On the contrary, the only description of the line of steamships, or of the place of business of their owners, is in a memorandum in the margin, as follows: "Guion Line. United States Mail Steamers. New York: 29 Broadway. Liverpool: 11 Rumford Street." No distinction is made between the places of business at New York and at Liverpool, except that the former is named first. The reservation of liberty, in case of an interruption of the voyage, "to tranship the goods by any other steamer," would permit transhipment into a vessel of any other line, English or American. And general average is to be computed, not by any local law or usage, but "according to York-Antwerp rules," which are the rules drawn up in 1864 at York, in England, and adopted in 1877 at Antwerp, in Belgium, at international conferences of representatives of the more important mercantile associations of the United States, as well as of the maritime countries of Europe. Lown. Av. (3 Ed.) app. Q.

The contract being made at New York, the ship-owner having a place of business there, and the shipper being an American, both parties must be presumed to have submitted themselves to the law there prevailing, and to have agreed to its action upon their contract. The contract is a single one, and its principal object, the transportation of the goods, is one continuous act, to begin in the port of New York, to be chiefly performed on the high seas, and to end at the port of Liverpool. The facts that the goods are to be delivered at Liverpool, and the freight and primage, therefore, payable there in sterling currency, do not make the contract an English contract, or refer to the English law the question of the liability of the carrier for the negligence of the master and crew in the course of the voyage. *P. & O. Steam Navigation Co. v.*

Shand, Lloyd *v.* Guibert, and Chartered Mercantile Bank *v.* Netherlands India Steam Nav. Co., before cited.

There is even less ground for holding the three bills of lading of the cotton to be English contracts. Each of them is made and dated at Nashville, an inland city, and is a through bill of lading, over the Louisville & Nashville Railroad and its connections, and by the Williams and Guion Steamship Company, from Nashville to Liverpool; and the whole freight from Nashville to Liverpool is to be "at the rate of fifty-four pence sterling per 100 lbs. gross weight." It is stipulated that the liability of the Louisville & Nashville Railroad and its connections as common carriers "terminates on delivery of the property to the steamship company at New York, when the liability of the steamship commences, and not before;" and that "the property shall be transported from the port of New York to the port of Liverpool by the said steamship company, with liberty to ship by any other steamship or steamship line." And in the margin is this significant reference to a provision of the statutes of the United States, applicable to the ocean transportation only: "Attention of shippers is called to the act of congress of 1851: 'Any person or persons shipping oil of vitriol, unslacked lime, inflammable matches, [or] gunpowder, in a ship or vessel taking cargo for divers persons on freight, without delivering at the time of shipment a note in writing, expressing the nature and character of such merchandise, to the master, mate, or officer, or person in charge of the loading of the ship or vessel, shall forfeit to the United States one thousand dollars.'" Act March 3, 1851, c. 43, § 7, 9 St. 636; Rev. St. § 4288. It was argued that as each bill of lading, drawn up and signed by the carrier and assented to by the shipper, contained a stipulation that the carrier should not be liable for losses by perils of the sea arising from the negligence of its servants, both parties must be presumed to have intended to be bound by that stipulation, and must therefore, the stipulation being void by our law and valid by the law of England, have intended that their contract should be governed by the English law; and one passage in the judgment in *P. & O. Steam Navigation Co. v. Shand* gives some color to the argument. 3 Moore, P. C. (N. S.) 291. But the facts of the two cases are quite different in this respect. In that case, effect was given to the law of England, where the contract was made, and both parties were English, and must be held to have known the law of their own country. In this case, the contract was made in this country, between parties, one residing and the other doing business here; and the law of England is a foreign law, which the American shipper is not presumed to know. Both parties or either of them may have supposed the stipulation to be valid; or both or either may have known that by our law, as declared by this court, it was void. In either aspect, there is no ground for inferring that

the shipper, at least, had any intention, for the purpose of securing its validity, to be governed by a foreign law, which he is not shown, and cannot be presumed, to have had any knowledge of.

Our conclusion on the principal question in the case may be summed up thus: Each of the bills of lading is an American, and not an English, contract, and, so far as concerns the obligation to carry the goods in safety, is to be governed by the American law, and not by the law, municipal or maritime, of any other country. By our law, as declared by this court, the stipulation by which the appellant undertook to exempt itself from liability for the negligence of its servants is contrary to the public policy, and therefore void; and the loss of the goods was a breach of the contract, for which the shipper might maintain a suit against the carrier. This being so, the fact that the place where the vessel went ashore, in consequence of the negligence of the master and officers in the prosecution of the voyage, was upon the coast of Great Britain, is quite immaterial. This conclusion is in accordance with the decision of Judge BROWN in the district court of the United States for the Southern district of New York in *The Brantford City*, 29 Fed. Rep. 373, which appears to us to proceed upon more satisfactory grounds than the opposing decision of Mr. Justice CHITTY, sitting alone in the chancery division, made since this case was argued, and, so far as we are informed, not reported in the law reports, nor affirmed or considered by any of the higher courts of Great Britain. *In re* Steamship Co., 58 Law T. (N. S.) 377. The present case does not require us to determine what effect the courts of the United States should give to this contract, if it had expressly provided that any question arising under it should be governed by the law of England.

The question of the subrogation of the libellant to the rights of the shippers against the carrier presents no serious difficulty. From the very nature of the contract of insurance

Right of insurer to subrogation to claim against carrier.	as a contract of indemnity, the insurer, upon paying to the assured the amount of a loss, total or partial, of the goods insured, becomes, without any formal assignment, or any express stipulation to that effect in the policy, subrogated in a corresponding amount to the assured's right of action against the carrier or other person responsible for the loss, and in a court of admiralty may assert in his own
--	--

name that right of the shipper. *The Potomac*, 105 U. S. 630, 634; *Phoenix Ins. Co., of Brooklyn v. Erie & W. Trans. Co.*, 117 U. S. 312, 321. In the present case the libellant, before the filing of the libel, paid to each of the shippers the greater part of his insurance, and thereby became entitled to recover so much, at least, from the carrier. The rest of the insurance money was paid by the libellant before the argument in the district court, and that amount might

nave been claimed by amendment, if not under the original libel. The *Charles Morgan*, 115 U. S. 69, 75, 5 Sup. Ct. Rep. 1172; The *Gazelle*, 128 U. S. 474, *ante*, 139. The question of the right of the libellant to recover to the whole extent of the insurance so paid was litigated and included in the decree in the district court, and in the circuit court on appeal; and no objection was made in either of those courts, or at the argument in this court, to any insufficiency of the libel in this particular.

The appellant does, however, object that the decree should not include the amount of the loss on the cotton shipped under through bills of lading from Nashville to Liverpool. This objection is grounded on a clause in those bills of lading which is not found in the bill of lading of the bacon and hams shipped at New York; and on the adjudication in *Phoenix Ins. Co., of Brooklyn v. Erie & W. Trans. Co.*, 117 U. S. 312, that a stipulation in a bill of lading that a carrier, when liable for a loss of the goods, shall have the benefit of any insurance that may have been effected upon them, is valid as between the carrier and the shipper, and therefore limits the right of an insurer of the goods, upon paying to the shipper the amount of a loss by stranding, occasioned by the negligence of the carrier's servants, to recover over against the carrier. But it behooves a carrier setting up such a defence to show clearly that the insurance on the goods is one which by the terms of his contract he is entitled to the benefit of. *Inman v. South Carolina R. Co.*, 129 U. S. 128. The through bills of lading of the cotton are signed by an agent of the railroad companies and the steamship company, "severally, but not jointly," and contain, in separate columns, two entirely distinct sets of "terms and conditions," the first relating exclusively to the land carriage by the railroads and their connections, and the second to the ocean transportation by the steamship. The clause relied on, providing that in case of any loss or damage of the goods, whereby any legal liability shall be incurred, that company only shall be held answerable in whose actual custody the goods are at the time, "and the carrier so liable shall have the full benefit of any insurance that may have been effected upon or on account of said goods," is inserted in the midst of the terms and conditions defining the liability of the railroad companies, and is omitted in those defining the liability of the steamship company, plainly signifying an intention that this clause should not apply to the latter. It is quite clear, therefore, that the appellant has no right to claim the benefit of any insurance on the goods. See *Evansville & C. R. Co. v. Androscoggin Mills*, 22 Wall. 594, 602.

Stipulation
that insur-
ance shall
inure to car-
rier's benefit

The result of these considerations is that the decree of the circuit court is in all respects correct and must be affirmed.

FULLER, C. J., and LAMAR, J., were not members of the court when this case was argued, and took no part in its decision.

Carriage of Goods—Insurance—Subrogation.—See *Inman v. South Carolina R. Co.*, *ante*, p. 663, and note.

Who Are Common Carriers.—See *Schloss v. Wood*, 35 Am. & Eng. R. R. Cas. 492, note, 495.

Bills of Lading—Construction.—The *lex loci contractus* governs the construction of bills of lading for the transportation of goods through other jurisdictions. *Ryan v. Missouri K. & T. R. Co.*, 23 Am. & Eng. R. R. Cas. 703; *Brooks v. New York, L. E. & W. R. Co.*, 21 Ib. 64.

FARRELL *et al.*

v.

RICHMOND AND DANVILLE R. CO.

(*North Carolina Supreme Court, March 18, 1889.*)

Carriage of Goods—Stoppage in Transitu—Insolvency of Buyer.—The fact that the consignees of goods were insolvent at the time of the sale will not defeat the vendor's right of stoppage *in transitu*, unless the vendors knew of such insolvency.

Same—Attachment of Goods.—The vendor's right of stoppage *in transitu* is not defeated by an attachment levied by the carrier for arrearages of freight due by the consignee.

Same—Bill of Lading—Lien for Arrearages.—A stipulation in a bill of lading that the carrier "shall have a lien upon the goods shipped for all arrearages of freight and charges due by the said owners or consignees on other goods," will not defeat the vendor's right of stoppage *in transitu*, such a stipulation being subordinate thereto.

Same—Verbal Pledge—Delivery.—Four or five weeks after the arrival of goods at their destination, the consignee, who owed arrearages of charges upon other goods, verbally pledged the goods to the railroad company as security therefor. The goods at that time were in the company's warehouse, and under a stipulation of the bill of lading the company had a lien thereon for the arrearages. There was no change of possession, nor was there any new consideration for the agreement. *Held*, that no delivery had taken place which would defeat the vendor's right of stoppage.

APPEAL from Superior Court, Durham County.

Action by Farrell & Co. against the Richmond & Danville R. Co., to recover the value of a safe alleged to be unlawfully detained by the defendant. The defendant appeals from a judgment for the plaintiffs.

C. M. Busbee for appellant.

E. C. Smith and *W. W. Fuller* for respondents.

SHEPHERD, J.—This was a civil action tried before MERRIMON, J., and a jury at June term, 1888, of the superior court of Durham

county. The plaintiffs alleged, in substance, that they were residents of Philadelphia, Pa.; that they sold a safe on credit to Robertson & Rankin, of Durham, N. C.; that they delivered it to the defendant company for transportation to Durham in said State, directed to said Robertson & Rankin; that after said shipment, and before its delivery to the purchasers, the plaintiffs learned that the purchasers were insolvent, and that they notified the defendant not to deliver the safe to said purchasers, or any other persons but the plaintiffs, at the same time tendering to defendant the freight and all other charges on said safe, and demanding the delivery thereof; that defendant refused to surrender said safe, but retains the same wrongfully, etc. There was no objection to the issues. Only so much of the answer of the defendant as relates to them and the exceptions will be stated. The answer denied that defendant wrongfully withheld the safe from the plaintiffs, and alleged that, Robertson & Rankin being indebted to defendant in the sum of \$130, defendant sued out a warrant of attachment against the said property before defendant had any notice of the plaintiffs' claim on said safe, and before any demand was made by them for the same, and that under the judgment and execution in said proceeding defendant purchased said safe. Defendant also alleged that, after the safe was received at its warehouse in Durham, it was delivered to Robertson & Rankin, and by them delivered to John A. Holt, agent of defendant at Durham, to be held by him as security for certain indebtedness then due and owing to the defendant by the said Robertson & Rankin.

The following issues were submitted to the jury: "(1) Did the defendant deliver the safe to Robertson & Rankin? *Answer.* No. (2) If it was delivered, did the plaintiffs demand possession before it was delivered, and tender freight and charges, as alleged in the complaint? A. Yes. (3) What damage, if any, have plaintiffs sustained? A. One hundred dollars, with interest from September 10, 1885."

The plaintiffs introduced the deposition of Jordan Matthews, as follows: "I am a member of the firm of Farrell & Co. The other members of the firm are John Farrell and George L. Remington. The business of the firm is manufacturing and selling fire-proof and burglar-proof safes. Our agent in May, 1885, for the State of North Carolina, was E. F. Hall, of Greensboro, N. C. Through him we sold a No. 5 Champion safe at one hundred dollars, at Philadelphia, to the firm of Robertson & Rankin, of Durham, N. C., upon an order dated May 21, 1885, signed by Robertson & Rankin. (Witness produces and identifies the order referred to in Exhibit A.) By the term 'at Philadelphia,' which I have just used, I mean that we deliver the safe free on board at Philadelphia, and the purchaser pays the freight. (We delivered the

safe to the steamship company named in the order, only in the capacity of a common carrier. When the safe was shipped we believed Robertson & Rankin to be solvent; otherwise we would not have shipped it.) I did not personally stop the delivery of the safe. (That I believe was done by our agent, Mr. Hall. It was within the scope of the authority given by us to the said agent to stop the delivery of any safe shipped to any person, upon the discovery that the vendee was insolvent.) Robertson & Rankin have never paid us a cent for this safe. (We have taken no security for the payment of the safe, except the printed clause in the order reserving the title to us until the safe should be paid for.)" The defendant objected to that portion of the foregoing testimony embraced within brackets. The court overruled the objections, and permitted the entire deposition to be read, and the defendant excepted. No point was made as to the right of the defendant to object, it being admitted that by an agreement made when the deposition was opened the defendant had the right to make the objections on the trial.

"EXHIBIT B.

"THE ASSOCIATED RAILWAYS OF VIRGINIA AND THE CAROLINAS—PIEDMONT AIR LINE. BILL OF LADING.

"PHILADELPHIA, 6-14, 1885.

"Received by Philadelphia and Richmond S. S. Line (The Clyde S. S. Co.), of Farrell & Co., under the contract hereinafter contained, the property mentioned below, marked and numbered as per margin, in apparent good order and condition (contents and value unknown), viz.:

"Marks and numbers: One iron safe, 1,184.

"Shippers' weight.

* * * * * * * *

"The several carriers shall have a lien upon the goods specified in this bill of lading for all arrearages of freight and charges due by the same owners or consignees on other goods."

The above extracts are all of Exhibit B which is necessary to an understanding of this case.

W. W. Fuller, witness for plaintiffs, testified that, a few days before the sale of the safe, E. F. Hall, plaintiffs' agent, and W. W. Fuller, plaintiffs' attorney, went to the depot of the Richmond & Danville Railroad Company, in Durham. Saw the safe in the warehouse, covered with baggage, marked to Robertson & Rankin, from Farrell & Co., and demanded the delivery to Hall and Fuller of the safe, at the time asking the amount of freight and charges thereon; which amount not being given, they tendered to Holt, agent of defendant, a sum of money not less than \$10, and offered to pay said freight and charges. Holt refused to receive the money or deliver the safe. Plaintiffs rested, it being

agreed that they might later give evidence of the insolvency of vendees of the safe at time of demand by Hall and Fuller.

John A. Holt, witness for defendant, testified that he was agent at Durham station for the defendant company, and was such agent at the time the safe was received at the warehouse. Robertson & Rankin were and had been receiving a lot of lumber, the freight on which amounted to considerably over \$100, which was then owing by them to defendant company. Witness had been sending to them, demanding payment of these freight bills, and had seen them in person about it. "That he went down the side track we term 'Lumber Track,' and found they had been taking off lumber after having been notified not to do so. That he had sent for Robertson, whom he knew to be the one attending to the firm's business. He came down to the warehouse, and witness met him at the upper end of the warehouse, where safe was standing. Asked him if I had not notified him time and again not to remove any lumber without first paying the freight. He said I had. I told him he had placed himself in a very bad situation, and that I was compelled to take steps against him. We were then standing right beside the safe, both of us leaning upon it. He said to Holt: 'Here is a safe I paid one hundred dollars for in Philadelphia. It is true I have disappointed you in my promises about coming to pay you those freight bills, but I have been disappointed myself in not receiving money.' He mentioned about having a large amount of money at several places, and said, pointing in the direction of Webb & Kramer's warehouse, that he was having an office put up there, and it would be completed the next day or the day after. He then said, placing his hand on the safe: 'I place this safe in your hands as security for what I owe, until the next day or the day after, when my office will be completed, and I will come and pay all freight bills, and remove the remnant of lumber and the safe, and take it over to my office.' I held the safe till some little time after that, when I got news that he had run away. This was before the time Mr. Fuller came after it,—some weeks before; may have been a month or two months,—considerable time. Don't remember exactly what time it was. Cross-Examination. The safe came about the 9th or 10th of June; had been here three or four or five weeks before my conversation with Robertson. The defendant sold the safe on the 10th of same month,—either August or September. The place where Robertson came at the warehouse was the same place where the safe was first placed. Robertson & Rankin were notoriously insolvent here when Mr. Fuller came and made demand, and had been so long before. Defendant has no receipt from Robertson & Rankin for the safe. Defendant took out attachment proceedings after Robertson & Rankin left here, and levied upon the safe under the proceedings, as Robert-

son & Rankin's, and it was afterwards sold under these proceedings, and bought by the defendant, who paid nothing for it, but credited Robertson & Rankin on their debt to the defendant. It is a rule of the defendant company not to deliver goods to any one without their signing receipt and paying freight. *Redirect.* At the time the safe was shipped to Robertson & Rankin they were entirely insolvent. *By the Court.* It is a rule of the defendant company not to deliver goods until the freight is paid. I had the power and could have delivered it, but it would have been disobeying orders, and would have thrown the entire responsibility on me. I was seeking to secure the freight on the lumber as well as on the safe. It is also a rule of the defendant that, if freight is not paid in thirty days, notice is given to the shippers to pay. The safe had been in the warehouse fully thirty days before Robertson pledged it to me, but no notice had been given the plaintiffs by me. I do not remember positively about this; it was some two, three, or four weeks. Never made any memorandum of it. I meant to say the safe was in the warehouse thirty days before it was sold under the attachment."

The defendant asked the following special instructions: "(1) That upon the testimony the plaintiffs are not entitled to recover. (Refused, and defendant excepted). (2) That, if the jury believe the testimony of John A. Holt, they must respond to the first issue, 'Yes,' and to the second issue, 'No.' (Refused, and defendant excepted). (3) That if the jury shall find that Robertson & Rankin were insolvent at the time the safe was shipped to them by the plaintiffs, the plaintiffs are not entitled to recover. (Refused, and defendant excepted)."

His honor charged the jury that there was no evidence that Holt, the defendant's agent, was authorized to accept the safe from Robertson & Rankin as a pledge to secure the freights due on the safe and lumber by them to the defendant, and, even if he was authorized so to do, that what transpired between Holt and Robertson did not amount to a delivery of the safe to Holt, and was not sufficient to deprive plaintiffs of any rights they might acquire in respect to the safe; that while the defendant might ratify Holt's act, if there was any pledge, yet if the safe had been pledged the jury might consider the fact that the defendant took out attachment proceedings against Robertson & Rankin as evidence of the repudiation by defendant of any contract of pledge; that if the jury should find that the plaintiffs, or any of them, knew, or had reason to know, that Robertson & Rankin were insolvent at the time the safe was shipped, the plaintiffs were not entitled to recover. His honor then instructed the jury that there was no evidence of any delivery of the safe to the defendant, or its agent authorized for such purpose, and directed them to answer the first issue in the negative, and the second in the affirmative. The de-

defendant excepted to the charge of the court and to the instructions given the jury. The jury rendered a verdict as set out in the record. Motion by defendant for new trial. Motion overruled. Appeal by defendant. Notice of appeal waived. Appeal bond fixed at \$50. By consent, 30 days allowed to file bond and serve case on appeal, and 30 days thereafter allowed plaintiffs to object to defendant's statement of case or to file counter statement.

Upon the appeal taken in the above entitled action the defendant assigns as errors: (1) The admission in evidence of the portions of the depositions of Jordon Matthews objected to by defendant. (2) The refusal of the court to give the special instructions asked by defendant. (3) That the court erred in instructing the jury that Holt was unauthorized to accept its safe from Robertson & Rankin as a pledge, and that, even if he was authorized, what transpired between Holt and Robertson did not amount to a delivery of the safe to Holt, and was not sufficient to deprive plaintiffs of any rights they might acquire in respect to the safe. (4) That the court erred in instructing the jury that they might consider the fact that the defendant took out attachment proceedings against Robertson & Rankin as evidence of the repudiation by defendant of any contract or pledge. (5) That the court erred in instructing the jury that there was no evidence of any delivery of the safe, and in directing the jury to answer the first issue in the negative and the second in the affirmative. There was a verdict for the plaintiffs. The defendant moved for a new trial, the motion was overruled, and defendant appealed.

Several exceptions were taken to the testimony which we think were properly overruled. That which relates to the witness' speaking of the contents and effect of Exhibit A would have been tenable, but as the exhibit was subsequently introduced, and was entirely consistent with the witness' statement, the defendant was in no wise prejudiced, and the exception is therefore without merit.

It is proper to notice that the third instruction asked by the defendant was that, if the jury should believe a certain state of facts, "the plaintiffs are not entitled to recovery." The same words are used by the court in one of the instructions given. Such language is not pertinent to any of the issues submitted. These present questions of fact, or mixed questions of law and facts, and upon the findings it is for the court to say whether or not the plaintiff is entitled to recover. Such instructions were proper upon the general issues submitted under the old practice, but are confusing when applied to our present system. It is true that in the present case no harm has resulted, as we can dispose of the appeal upon the testimony of the defendant, but we have adverted to this improper manner of asking for and giving instructions in

order that the loose practice in this respect may be discontinued. We can very readily conceive how juries may be perplexed and misled by such general charges when they come to pass upon the specific issues submitted to them, and how new trials may be thus made necessary which could otherwise have been easily avoided.

The plaintiff's action is based upon their alleged right to stop the property *in transitu*. This right "arises solely upon the insolvency of the buyer, and is based on the plain reason of justice and equity, that one man's goods shall not be applied to the payment of another man's debts. If, therefore, after the vendor has delivered the goods out of his own possession, and put

<p>Right of stoppage exists where seller is ignorant of buyer's insolvency.</p>	<p>them in the hands of a carrier for delivery to the buyer (which, as we have seen, is such a constructive delivery as divests the vendor's lien), he discovers that the buyer is insolvent, he may retake the goods, if he can, before they reach the buyer's possession, and thus avoid having his property applied to paying debts due by the buyer to other people." It is "highly favored on account of its intrinsic justice." 2 Benj. Sales, §§</p>
--	---

1229-1231. It "is but an equitable extension or enlargement of the vendor's common law lien for the price, and not an independent and distinct right." Note to section 1229, *supra*. "It is quite immaterial that the insolvency existed at the time of the sale, provided the vendor be ignorant of the fact at that time." *Loeb v. Peters*, 63 Ala. 243. and a number of cases cited in note to section 1244, Benj. Sales, *supra*. These last authorities fully sustain his honor in refusing the third instruction asked for by the defendant. The mere fact that Robertson & Rankin, the consignees, were insolvent at the time of the sale, could not defeat the lien of the plaintiffs, unless they knew of such insolvency. The charge as given was correct in this particular, and the jury having found substantially that the plaintiffs were, nothing further appearing, entitled to avail themselves of the right of stoppage *in transitu*, and that they exercised that right through their agent. Mr. Fuller, we will now consider the several defences made by the defendant.

No agreement or usage having been shown to the contrary, the right of stoppage *in transitu* continued until the safe was actually or constructively delivered to the consignee. Id. §

<p>Right of stoppage not defeated by attachment.</p>	<p>1269; <i>Hause v. Judson</i>, 29 Amer. Dec. 377, and notes. The first defence, though not seriously pressed upon the argument, is that the defendant acquired title by reason of the sale under the attachment proceedings instituted by it against the consignee for arrearages of freight due on lumber. "The vendor's right of stoppage <i>in transitu</i> is paramount to all liens against the purchasers (<i>Hill. Sales</i>, 289; <i>Blackman v. Pierce</i>, 23 Cal. 508); even to a lien in favor of</p>
---	---

the carrier, existing by usage, for a general balance due him from the consignee (*Oppenheim v. Russell*, 3 Bos. & P. 42). An attachment or execution against the vendee does not preclude the stoppage *in transitu*, for this is not a taking possession by the vendee's authority; the proceeding being *in invitum*." Note to *Hause v. Judson*, *supra*, where a large number of authorities sustaining the text are collected. These authorities conclusively settle that the defence under the attachment proceedings cannot be maintained.

The second defence rests upon the following clause of the bill of lading: "The several carriers shall have a lien upon the goods [shipped] for all arrearages of freight and charges due by the said owners or consignees on other goods." The counsel for the defendant could give us no authority in support of this defence, and none, we think, can be found, to the effect that such a stipulation should be construed to take away this "highly favored" and most important right of the vendor to preserve his lien, in order "that his goods may not be applied to the payment of another man's debts," much less to those of his agents to whom he delivers them for carriage. Shippers would hardly contemplate that in accepting such a bill of lading, the well established and cherished right of stoppage *in transitu* was to be made dependent upon whether a distant consignee was indebted to the carrier, and the commercial world would doubtless be surprised if it were understood that whenever such a stipulation was imposed upon consignors they were in effect yielding up their lien for the purchase money, and substantially pledging their goods for the payment of an existing indebtedness due their agent, the carrier, by a possible insolvent vendee. If such is the proper construction, we can well appreciate the language of LORD ALVANLEY in *Oppenheim v. Russell*, 3 Bos. & P. 42, when he said that he hoped it would "never be established that common carriers, who are bound to take all goods to be carried for a reasonable price tendered to them, may impose such a condition upon persons sending goods by them." He doubts whether an express agreement between the carrier and the consignor would be binding, and BEST, J., in *Wright v. Snell*, 5 Barn. & Ald. 350, in speaking generally of such contracts, said he "doubted whether a carrier could make so unjust a stipulation." Chancellor KENT, in the second volume of his Commentaries, remarks that "it was again stated as a questionable point in *Wright v. Snell* whether such a general lien could exist as between the owner of the goods and the carrier, and the claim was intimated to be unjust. It must, therefore, be considered a point still remaining to be settled by judicial decision." Page 638. It is unnecessary, however, for us to say whether such a condition or agreement would

Stipulation
for lien for
arrearages
does not
defeat right
of stoppage.

be reasonable and binding, as it seems very clear to us that the stipulation in the present case is not susceptible of the construction contended for, and that it is entirely subordinate to the right of stoppage *in transitu*. The exercise of this right revested the right of possession in the plaintiffs, and, they having tendered all they owed the defendant, no interest was ever acquired by the vendee to which the claim of the defendant could attach.

The third and most plausible defence is that, according to the testimony of the agent, Holt, there was a constructive delivery to the consignee, and that this defeated the rights of the plaintiffs. The doctrine is well settled that "where goods are placed in the

**Facts held
not suffi-
cient to
show con-
structive
delivery.**

possession of a carrier, to be carried for the vendor, to be delivered to the purchaser, the *transitus* is not at an end . . . until the carrier, by agreement between himself and the consignee, undertakes to hold the goods for the consignee, not as carrier, but as his agent; and the same principle will apply to a warehouseman or a wharfinger." 2 Benj. Sales, *supra*, § 1269. Was there any such agreement in this case? The most that can be said is that the consignee offered to pledge the safe to the defendant for the freight already due on lumber. There was no actual change of possession. The safe was in the defendant's warehouse, and Holt, the agent, and the consignee were both leaning upon it. The consignee, placing his hand on it, said: "I place this safe in your hands as security for what I owe." There was no response whatever by Holt. He simply states that he "held the safe till some little time afterwards," when he heard that the consignee had run away, and that he sued out the attachment proceedings mentioned in the answer. The majority of us are of the opinion that there was no reasonably sufficient evidence to be submitted to the jury upon the acceptance of the offer and of delivery. There being no actual delivery, a constructive one can only be effected by a valid agreement on the part of the common carrier to hold for the consignee. Mr. Benjamin, from whom we have so largely quoted, says "that the existence of the carrier's lien for unpaid freight raises a strong presumption that the carrier continues to hold the goods as carrier, and not as warehouseman; and, in order to *rebut this presumption* [the italics are ours], there must be proof of some arrangement or agreement between the buyer and the carrier, whereby the latter, while retaining his lien, becomes the agent of the buyer to keep his goods for him." But, conceding that the acquiescence of Holt was some evidence of the acceptance of the offer, would this in law amount to such a delivery as will defeat the plaintiffs' right? Passing by the question as to whether the defendant bailee was not estopped to set up such a transaction in favor of itself and

against its principal (2 Wait, Act. & Def. 57), and also the fact that the alleged agreement was not to hold as agent of the vendee but for itself, we are of the opinion that what transpired between the defendant's agent and the vendee did not alter in the slightest degree the relation in which they stood to each other. It will be borne in mind that there was no actual delivery; that the defendant had a lien for the freight due on the property, and under the stipulation in the bill of lading it had, as against the consignee, also a lien for the arrearages of freight due by him. There was no new consideration, and the proposition of the consignee and its alleged acceptance by the defendant, left them in precisely the same position as before. It amounted virtually to the defendant's saying: "If you will pay the freight and arrearages I will deliver you the safe." This was, as we have seen, the effect of the bill of lading. In the leading case upon this subject (*Whitehead v. Anderson*, 9 Mees. & W. 517, cited with approval by Benjamin, *supra*), the agent of the consignee went on board of the ship when she arrived in port, and told the captain that he had come to take possession of the cargo. He went into the cabin, into which the ends of the timber projected, and saw and touched the timber. When the agent first stated that he came to take possession, the captain made no reply, but subsequently, at the same interview, told him that he would deliver him the cargo when he was satisfied about his freight. They went ashore together, and shortly after an agent of the consignor served a notice of stoppage *in transitu* upon the mate, who had charge of the cargo: "*Held*, that under these circumstances, there was no actual possession taken of the goods by the consignees, and that, as there was no contract by the captain to hold the goods as their agent, the circumstances did not amount to a constructive possession of the goods by them. There is no proof of any such contract. A promise by the captain to the agent of the consignees is stated, but it is no more than a promise, without a new consideration, to fulfil the original contract, and deliver in due course to the consignee on payment of freight, which leaves the captain in the same situation as before. After the agreement he remained a mere agent for expediting the cargo to its original destination." This, it seems to us, is conclusive of our case. Here there was no new consideration whatever moving from the vendee, nor was there any definite understanding that the defendant was to forbear pressing the vague proceedings suggested by him. 1 Add. Cont. 11, note. There was, therefore, no new contract, and the defendant held the safe in the same character as he did before, when, as we have shown, it was subject to the paramount claim of the plaintiffs. We have been able to find no case where a pledge of this kind has been asserted, but we have observed that all the cases we have examined lay down the rule that constructive delivery is only

made by the carrier, either agreeing, expressly or by implication, to hold as the agent of the consignee.

While the amount involved in this suit is small, we have thought it our duty, in view of the importance of the questions of law presented, to carefully examine many of the multitude of cases upon this subject, and our conclusion is that his honor was correct in telling the jury that what transpired between Holt and Robertson (one of the consignees) did not amount to a delivery, and was not sufficient to deprive the plaintiffs of any rights they might acquire in respect to the safe.

There is no error.

Stoppage in Transitu—Insolvency of Buyer at Time of Sale.—A vendor of goods may exercise the right of stoppage in transitu upon his subsequent discovery of insolvency existing at the time of the sale, as well as upon a subsequent insolvency. *Loeb v. Peters*, 63 Ala. 243; *Blum v. Marks*, 21 La. An. 268; *Schwabacher v. Kane*, 13 Mo. App. 126; *O'Brien v. Norris*, 16 Md. 122; *Reynolds v. Boston & M. R. Co.*, 43 N. H. 589; *Benedict v. Schaettle*, 12 Ohio St. 515. But where the insolvency existed at the time of the sale, the vendor must show that he was ignorant of the fact. *Blum v. Marks*, 21 La. An. 268.

Same—Sufficiency of Notice.—See *Allen v. Maine Cent. R. Co.*, 30 Am. & Eng. R. R. Cas. 122, note 126.

Same—Levy of Attachment—Creditor of Vendee.—The right of the vendor to effect a stoppage *in transitu* is not defeated by an attachment levied by a creditor of the consignee upon the goods whilst they are in the hands of the carrier. Note, 32 Am. & Eng. R. R. Cas. 567, and cases there cited; *Mason v. Wilson*, 43 Ark. 172; *O'Neil v. Garrett*, 6 Iowa 480; *Durgy Cement Co. v. O'Brien*, 123 Mass. 12; *Naylor v. Dennie*, 8 Pick. (Mass.) 198; s. c., 19 Am. Dec. 319; *House v. Judson*, 4 Dana (Ky.) 13; *Newhall v. Vargas*, 15 Me. 314; *Dickman v. Williams*, 50 Miss. 500; *Estey v. Truxel*, 25 Mo. App. 238; *More v. Lott*, 13 Nev. 376; *Atkins v. Colby*, 20 N. H. 154; *Inslee v. Lane*, 57 N. H. 454; *Covell v. Hitchcock*, 23 Wend. (N. Y.) 611; *Kitchen v. Spear*, 30 Vt. 545. But compare *Baltimore & O. R. Co. v. Davis*, 32 Am. & Eng. R. R. Cas. 563. If the attaching creditor has paid the freight, the vendor must repay the same before he will be entitled to re-take the goods. *Rucker v. Donovan*, 13 Kan. 251; s. c., 19 Am. Rep. 84; *Greve v. Dunham*, 60 Iowa 108. See also *Langstaff v. Stix*, 64 Miss. 171; s. c., 28 Am. & Eng. R. R. Cas. 85.

Same—Carrier's Lien.—The right of an unpaid vendor to stop goods in transit is superior to a carrier's lien, existing, by usage, for a general balance due him by the consignee. *Oppenheim v. Russell*, 3 Bos. & P. 42. But in the case of the lien for the freight upon the particular consignment, the consignor, before he can reclaim the goods, must defray the carrier's charges. *Jackson v. Nichol*, 5 Bing. N. C. 508. The consignor's right of stoppage is paramount to a demand for freight made by the assignee of the vessel upon which the goods were shipped, when the vessel at the time of the shipment belonged to the consignee, and by the bill of lading it was stipulated that the goods were shipped "free on owner's account." *Mercantile & Exchange Bank v. Gladstone*, L. R. 3 Exch. 233.

Same—Termination of Transit.—The *transitus* of goods in the possession of a carrier is not at an end so long as the carrier continues to hold the goods as a carrier. It is not at an end until the carrier, by agreement between himself and the consignee, undertakes to hold the goods for the consignee, not as a carrier, but as his agent, and the same principle applies to warehousemen. *Ex parte Cooper*, L. R. 11 Ch. Div. 68; *Coventry v. Gladstone*, L. R. 6 Eq. 44; *Whitehead v. Anderson*, 9 Mees. & W. 518; *Ex parte Barrow*, L. R. 6 Ch. Div. 783; *Bolton v. Lancashire & Y. R. Co.*, L. R. 1 C. P. 431; *Jackson v. Nichol*, 5 Bing. N. C. 510; *James v. Griffin*, 2 Mees. & W. 623; *Reynolds v. Boston & M. R. Co.*, 43 N. H. 580; *Inslee v. Lane*, 57 N. H. 454; *Powell v. Kechnie*, 3 Dak. 319; *McFetridge v. Piper*, 40 Iowa 627; *Clapp v. Peck*, 55 Iowa 270.

Thus, under the Code of Georgia, sec. 2649, which declares that the right of stoppage shall continue until actual receipt of the goods by the vendee, it was held that, although goods had reached their destination and, by agreement between the railroad company and the consignee, had been set apart in the company's depot to be sold for the payment of arrearages of freight due to the carrier, no delivery was effected by this agreement, and the right of stoppage still continued. *Macon R. Co. v. Meador*, 65 Ga. 705. But where goods were landed by a carrier at a wharf, and no duty was thereby put upon the wharfinger (the goods being left there subject to the control and direction of the purchaser), it was held that the right of stoppage *in transitu* was at an end. *Sawyer v. Joslin*, 20 Vt. 172.

The carrier's change of character into that of an agent to keep the goods for the buyer, is not inconsistent with his right to retain the goods in his custody until his lien upon them for carriage or other charges is satisfied. *Hall v. Dimond*, 63 N. H. 565; *Allan v. Gripper*, 2 C. & J. 218. But where the goods are removed by the carrier and placed in its warehouse, in its capacity as carrier, to await the payment of the freight charges and the delivery to the vendee, the implication of the law is, that the goods are still in transit, and subject to the vendor's right of stoppage. *Symms v. Schotten*, 35 Kan. 310. So, too, where the warehouseman, to whom the goods are sent, receives them as the agent of the carrier, and while he is holding the goods as such agent, the vendor asserts his right of stoppage, the goods will not be considered as in the possession of the vendee so as to defeat that right. *Hoover v. Tibbits*, 13 Wis. 89. But when the freight on the goods has been paid by the consignee, and the goods receipted for, but left in the depot to be called for, the transit is at an end; and they are no longer subject to the vendor's right. *Langstaff v. Stix*, 64 Miss. 171; s. c., 28 Am. & Eng. R. R. Cas. 85.

If, however, the goods have been stored in consequence of the vendee's refusal to pay freight charges, which he considers to be excessive, a creditor of the vendee can, by making payment on the freight, terminate the transit so as to defeat the vendor's right of stoppage. *Greve v. Dunham*, 60 Iowa 108. See also note, 6 Am. & Eng. R. R. Cas. 376.

Same—Who May Exercise the Right.—See note, 6 Am. & Eng. R. R. Cas. 375.

Same—Constructive Delivery by Endorsement of Bill of Lading.—See note, 3 Am. & Eng. R. R. Cas. 330.

WOLFE

7.

MISSOURI PACIFIC R. CO.

(*Missouri Supreme Court, March 4, 1889.*)

Carriage of Goods—Wrongful Delivery—Action by Factor.—A factor for the consignor of goods, who has no interest in the goods beyond his lien for commissions, but who is the consignee in the bill of lading, is a "trustee of an express trust," within the meaning of the Missouri statute, and may, when he has contracted with the carrier for the delivery of the goods to himself, maintain an action in his own name for their wrongful delivery to another.

Same—Special Directions.—A seller of goods consigned them to his local agent. The agent, without transferring the bill of lading, made a contract with the carrier to side track the goods at the place of delivery, but directed the carrier to deliver the goods only upon his order. *Held*, that there was sufficient testimony to support a finding that the right of possession was not surrendered by the consignor or his agent, and that a delivery by the carrier was without authority and at his own risk.

APPEAL from St. Louis Circuit Court.

Action for breach of a contract of carriage. The defendant appeals from a judgment for the plaintiff.

T. J. Partis, Bennet Pike and Henry G. Herbel for appellant.
Taylor & Pollard for respondents.

BARCLAY, J.—Plaintiffs brought this action to recover damages for breach of a contract for the carriage and delivery of seven car loads of wire. No questions arise requiring any special reference to the pleadings. They properly present the issues made by the facts hereafter discussed. The cause was tried by Hon. AMOS M. THAYER as circuit judge, a jury having been waived.

It appeared at the trial that Henry Fuchs, a barb-wire manufacturer in St. Louis, in April, 1884, made a written contract with the Cambria Iron Company of Johnstown, Pa., by which the iron company was to furnish said Fuchs with "12 tons of wire per day for 25 business days, beginning April 30th, and then 18 tons per day for 25 business days," at certain named prices. Settlements were to be monthly, "less 2 per cent. discount for payment in 10 days from date of shipment," and "the seller's responsibility for goods in transit should cease when they pass into the custody of the transporting company." The iron company, in pursuance of this agreement, shipped 10 car loads of wire for said Fuchs, but consigned the same to Wolfe & Good (the plaintiffs), their St. Louis agents, at East St. Louis. On the arrival of the wire at East St. Louis it was delivered to the St. Louis Bridge & Tunnel R. R. Company, by the Ohio & Mississippi Railway (the terminal carrier), in obedience to Wolfe & Good's instructions, and was by the bridge and tunnel company then delivered to defendant for transfer and delivery at Pope's switch, Fourteenth and Gratiot streets, in St. Louis. No bill of lading was issued to Wolfe & Good, or to any other person, by either the bridge and tunnel company or the defendant, for the hauling of this wire from East St. Louis to St. Louis. There was a custom prevalent with roads terminating at East St. Louis and St. Louis to designate the destination of cars thus transferred across the river, by tacking a card of a particular color on the car door, which indicated to the receiving carrier the particular depot, switch, or side track on which the car was to be placed; different colored cards representing the several depots, switches, and side tracks. The cars containing this wire were designated by blue cards, which indicated Pope's switch as their destination. That was a private switch used by the Pope Iron and Metal Company, and two or three other establishments, among them Fuchs' Wire Works. The wire was shipped in three or four car load lots. Three car loads were received by defendant, and delivered

to Fuchs on written orders of Wolfe & Good. Prepayment of the purchase price of these three car loads was not exacted of Fuchs by Wolfe & Good. The remaining seven cars were delivered by defendant to Fuchs, on his demand, at different dates, in May, 1884. That delivery constitutes the gist of this action. Whether it was made with the consent of plaintiffs, Wolfe & Good, or without it, was the main issue of fact tried. The evidence conflicted on that point. The trial court found that the delivery was without their consent.

It further appeared in evidence that plaintiffs, as agents for the Cambria Iron Company, had no other pecuniary interest in the wire than for the payment of their commissions; and that immediately upon receipt of advices from the Cambria Iron Company of the shipment in controversy, Wolfe & Good had sent to Fuchs invoices or bills of account for the car loads in question, which he received several days before the wire arrived. In the progress of the trial the court admitted testimony of alleged conversations by telephone connected with plaintiff's office, though the witness did not identify the voice he heard at their instrument. The court made the following declarations of law against defendant's objections, viz.: "The court decides the law to be that a person in whose name a contract is made for the benefit of another is a trustee of an express trust, and as such can maintain an action in his own name. If, therefore, the court finds from the evidence that the contract of the defendant to carry the goods in question from the place where it received the same to Fourteenth and Gratiot streets was made in the name of plaintiffs, though for the benefit of the Cambria Iron Co., then the plaintiffs would have a standing in court, and could recover if the delivery to Fuchs was wrongful. The court further declares the law to be that if it finds from the evidence that on the arrival of the goods in question at East St. Louis the plaintiffs received said goods in pursuance of the bills of lading read in evidence; that thereafter the plaintiffs ordered the St. Louis Bridge and Tunnel R. R. Co. to have said goods delivered to Fourteenth and Gratiot streets; that the delivery of said goods included the hauling of said goods from the eastern terminus of defendant's railroad to said Fourteenth and Gratiot street; that said defendant received said goods of said St. Louis Bridge and Tunnel R. R. Co., and, in delivering said goods, defendant acted in law simply as agents of plaintiffs; and if the court further finds that such contract for delivering to defendant was made in the name of plaintiffs,—then said plaintiffs would stand in the relation of trustee of an express trust, and as such could sue defendant for the goods in question if wrongfully delivered. The court further declares the law to be that the defendant had nothing to do with the contract between the Cambria Iron Company and Fuchs for the purchase

of wire. The defendant could not constitute itself an arbitrator touching any matter of difference between the parties of said contract. It was the duty of the defendant to deliver the goods in question to Wolfe & Good, the consignees, or else to such person as they might deliver the bills of lading, properly endorsed, or else such person as they might order said defendant to deliver the goods to. The court then found for plaintiffs in the sum of \$7,028.17, the value of the seven car loads of wire. After moving for a new trial without avail, and duly saving exceptions, defendant appealed.

1. Plaintiffs' right to maintain this action was made an issue by the answer. It is naturally the first subject of consideration. The

Factors goods in question were billed by the iron company to
may sue for plaintiffs at East St. Louis. They received them there,
wrongful and in their own firm name contracted for their de-
delivery in livery at Pope's switch in St. Louis to themselves.
their own They were acting as factors for the iron company in
name. the transaction, having no pecuniary interest in the
 goods beyond their lien for commissions. By our Code
 of Practice it is provided that every civil action must

be prosecuted in the name of the real party in interest, with certain exceptions. Among these is a "trustee of an express trust," who may sue in his name without joining the person for whose benefit the action is prosecuted. The statute explicitly declares that "a trustee of an express trust, within the meaning of this section, shall be construed to include a person with whom, or in whose name, a contract is made for the benefit of another." Rev. St. 1879, § 3463. Plaintiffs fairly come within this statutory definition. In this regard the Code merely designed to preserve a right of action which existed by the modern common law of England on such facts as here appear. *Short v. Spackman*, 2 Barn. & Adol. 962 (1831); *Drinkwater v. Goodwin*, Cowp. 256. Our statute, above quoted, is the same as a section of the Code of New York. The uniform interpretation of it there has permitted such actions as this to be maintained. *Grinnell v. Schmidt*, 2 Sandf. 706 (1850); *Considerant v. Brisbane*, 22 N. Y. 389 (1860); *Ladd v. Arkell*, 37 N. Y. Super. Ct. 40; *Wetmore v. Hegeman*, 88 N. Y. 72 (1883). We are of opinion that the instructions correctly declared the law regarding plaintiffs' right to sue.

2. On the merits the chief contention of defendant is that the facts here presented, explained by the terms of the contract between the iron company and Fuchs, justified the delivery of the wire in question to Fuchs. On this
Delivery branch of the case the only facts that can properly be
contrary to reviewed are those which now remain admitted or un-
shipper's disputed. An issue was determined in the trial court
orders. regarding this delivery to Fuchs; defendant asserting
 that plaintiffs consented to it, and plaintiffs denying that asser-

tion. On that issue the evidence was quite conflicting. No sufficient reason has been assigned for disturbing the finding of Judge THAYER that plaintiffs did not assent to such delivery. That was evidently the chief point of difference in the case, and its decision has greatly narrowed the field of this controversy. Defendant concedes its duty to carry and deliver the wire to Pope's switch; but claims that on the undisputed facts Fuchs was the true owner, and that its delivery to him was therefore lawful. Undoubtedly a carrier in some circumstances may deliver goods to the true owner instead of to him who gave them into its charge for carriage. Its contract (subject to certain exceptions not in consideration here) is to carry and deliver (according to shipper's orders), or to account for the goods. It would be a lawful accounting to show that they had been delivered to the real owner upon his demand. This principle is now so well established in the law that the mere statement of it will suffice for the purposes of this case. The Idaho, 93, U. S. 579; Western Transportation Co. v. Barber, 56 N. Y. 544. But to justify a delivery to the true owner contrary to or without the orders of the shipper the carrier assumes the burden of proving the ownership at the time of such delivery. Among other things it must establish the immediate right of possession in the person to whom such delivery is made. Referring to the facts here before us, it may have been a breach of the contract existing between Fuchs and the iron company for the latter to refuse to deliver the wire to the former without prepayment of the price. But the carrier engaged to convey the wire to the point of contemplated delivery, could not lawfully transfer to the purchaser the right of possession, if the shipper did not, in fact, part with that right. Whether the seller retains the *jus disponendi* (as the text writers term it) is often a question of fact depending on the intention of the parties to be gathered from their acts, as in this instance. The disposition of the bill of lading, which in the commercial world is recognized as the emblem of the property itself, frequently throws light on that intention. Here the owner did not bill the wire to the purchaser, but consigned it to its own local agents, the plaintiffs. The latter, without transferring the bills of lading, made a further contract of their own, whereby defendant was to carry the goods to the place where delivery to the purchaser was expected to be made. The last contract for carriage was evidenced by no writing, but its terms are not disputed. The wire was deliverable by defendant at Pope's switch only to the order of plaintiffs, though such order might (in the circumstances) have been merely verbal. The invoices and contract sale between Fuchs and the iron company were admitted in evidence as part of the *res gestæ*, explanatory of the acts of the parties; but the carrier was no party to the contract, and had no right to act on its own interpretation of the duties which the parties owed to

each other according to its terms. Whether or not, under it, the shipper's agents should have delivered possession of the wire to the purchaser on its arrival at the switch was a question which it did not devolve on the carrier to decide. Until the shipper whose goods it had in charge parted with the right of possession, the intending purchaser did not become the owner. Until then, any delivery by the carrier to him (on the facts here considered) was at its own risk. There was ample testimony to support the finding of the trial court that the right of possession was not surrendered by the seller or its agents,—the plaintiffs,—and that the delivery by the carrier was without authority. The instructions given by the trial court correctly stated these principles.

3. A question arose incidentally at the trial upon the admission in evidence of a conversation held through the telephone between some one at the instrument in plaintiffs' private office and the witness. It was admitted, though the witness did not identify the voice of the speaker as that of either of the plaintiffs or their clerk. The courts of justice do not ignore the great improvement in the means of intercommunication which the telephone has made. Its nature, operation, and ordinary uses are facts of general scientific knowledge, of which the courts will take judicial notice as part of public contemporary history. When a person places himself in connection with the telephone system through an instrument in his office, he thereby invites communication in relation to his business through that channel. Conversations so held are as admissible in evidence as personal interviews by a customer with an unknown clerk in charge of an ordinary shop would be in relation to the business there carried on. The fact that the voice at the telephone was not identified does not render the conversation inadmissible. The ruling here announced is intended to determine merely the admissibility of such conversations in such circumstances, but not the effect of such evidence after its admission. It may be entitled, in each instance, to much or little weight in the estimation of the triers of fact, according to their views of its credibility, and of the other testimony in support or in contradiction of it.

Finding none of the assignments of error well taken we affirm judgment. All concurring.

Carriage of Goods—Delivery—Liability.—A consignor, whilst the goods were still in the carrier's hands, directed that they should be delivered to his agent, and not to the consignee. An order having been presented which was signed by the consignor's agent directing that they be delivered to the consignee, the carrier delivered the goods to the persons indicated in another order signed by the consignee. The consignor made no objection to such delivery, but brought an action against the consignee for the value of the goods. *Held*, that, under the circumstances, the carrier was relieved of all liability to the consignor by the delivery which had taken place. *Brasher v. Denver & Rio Grande R. Co.* (Colo.), 21 Pac. Rep. 44.

STATE OF IOWA

v.

CHICAGO, BURLINGTON AND QUINCY R. CO.

(U. S. Circuit Court, S. D., Iowa, January 27, 1889.)

Removal of Cause—Extortion—Penalty—Criminal Action.—An action brought in the form of a civil suit to recover the penalty prescribed by section 27 of the Iowa Act of April 5, 1888, which enacts that any railroad company "guilty of extortion shall forfeit and pay the State of Iowa not less than \$1,000 nor more than \$5,000, to be recovered in a civil action by ordinary proceedings instituted in the name of the State of Iowa" is, notwithstanding its form, criminal in its nature, and is not removable to the federal courts.

ON motion to remand.

A. J. Baker, Attorney General and *C. E. Nourse* for plaintiff.*Dexter, Herrick & Allen* and *J. W. Blythe* for defendant.

Before BREWER, SHIRAS, and LOVE, JJ.

BREWER, J.—This is one of several actions brought in the State court against the defendant and other railroad companies, to recover penalties alleged to have been incurred under section 27 of an act of the legislature of Iowa, entitled "An act to regulate railroad corporations," etc., approved April 5, 1888. The defendants filed answers, and at the same time filed petitions for removal to the circuit court of the United States, on the ground that the cases were cases arising under the constitution of the United States. Transcripts of the records were filed in this court in apt time, and a motion has been made by the plaintiff to remand the cases to the State court. In support of this motion it is contended: (1) That the cases are not "suits arising under the constitution of the United States," within the meaning of the act of congress; (2) that they are not suits "of a civil nature;" (3) that they are not cases of which the circuit court is "given original jurisdiction" by section 1 of the act, and are not, therefore removable. Noticing the second question, it is provided by section 2 of the removal act of March 3, 1887, "that any suit of a civil nature, at law or in equity, etc., may be removed;" and it is insisted that this is not a suit of a civil nature. By the act of April 5th, *supra*, certain acts are declared to be extortion. Section 26 declares that "any such railroad corporation guilty of extortion . . . shall, upon conviction thereof, be fined in any sum not less than one thousand dollars nor more than five thousand dollars, . . . such fine to be imposed in a criminal prosecution by indictment; or

shall be subject to the liability prescribed in the next succeeding section, to be recovered as therein provided." This next succeeding section provides: "Sec. 27. Any such railroad corporation guilty of extortion . . . shall forfeit and pay the State of Iowa not less than one thousand dollars nor more than five thousand dollars, . . . to be recovered in a civil action by ordinary proceedings instituted in the name of the State of Iowa."

It will be observed that section 27 defines the action as a civil action, and in fact the one before us is in the ordinary form of an action of debt. But while the form is civil, is it of a civil or criminal nature? For obviously not the form, but the nature, of the action determines the question. The right to remove is given by act of congress, which prescribed both the limits and the conditions, and it cannot be that, after congress has thus legislated, the right of removal can be defeated by any legislation of the State changing the mere form in which litigation is to be carried on; otherwise the will of congress could be defeated by any State. Would it for a moment be tolerated that litigation as to the collection of a note could be held in the State and withheld from the federal court by any act of the State legislature providing that such collection should be by indictment, instead of the usual form of a civil action? *Railroad Co. v. Jones*, 29 Fed. Rep. 193. The question, therefore, is, what is the nature of the action provided for by section 27?

The distinction between matters of a civil and those of a criminal nature is clear, and of frequent mention in the books. Blackstone says (volume 4, p. 5): "The distinction of public wrongs from private, of crimes and misdemeanors from civil injuries, seems principally to consist in this: that private wrongs or civil injuries are an infringement or privation of civil rights which belong to individuals; public wrongs, or crimes and misdemeanors, are a breach and violation of public rights and duties due to the whole community, considered as a community, in its social aggregate capacity." Rapalje and Lawrence, at page 21 of their *Law Dictionary*, say: "An action is 'civil' when it lies to enforce a private right, or redress a private wrong. It is 'criminal' when instituted on behalf of the sovereign or commonwealth in order to vindicate the law by the punishment of a public offence." Burrill, in his *Law Dictionary*, 294, says: "A civil action is an action brought to recover some civil right, or to obtain redress for some wrong not being a crime or misdemeanor." See 3 Bl. Comm. 2, 116. He also defines a civil right as—"The right of a citizen; the right of an individual as a citizen; a right due from one citizen to another, the privation of which is a civil injury, for which redress may be sought by a civil action." Burr. Law Dict. 296. Bouvier says a civil action is—"A personal action, which is

instituted to compel payment, or the doing of something which is purely civil." "At common law: An action which has for its object the recovery of private or civil rights or compensation for their infraction." Bouv. Law Dict. 317.

"Penal statutes or laws," say Rapalje and Lawrence, "are of three kinds: *Pœna pecuniaria, pœna corporalis, pœna exilii*." See, also, Hussey v. More, Cro. Jac. 415. The same authorities define "penal statutes" to be "those which impose penalties or punishment for offences committed." Rap. & L. Law Dic. 945. And, further, "penalty" is a sum of money payable as an equivalent or punishment for an injury. Id. Burrill defines "penalty" as—"A punishment imposed by statute as the consequence of the commission of a certain specific offence; a pecuniary punishment; a sum of money imposed by statute to be paid as a punishment for the commission of a certain act." Burr. Law Dict. 286. He defines a penal action as—"An action upon a penal statute; an action for the recovery of a penalty given by statute." In distinguishing between cases which are civil and those which are criminal in their nature, the supreme court of Maine, in Beals v. Thurlow, 63 Me. 9, says: "The plaintiff does not sue to compel payment of any debt due to himself, or for the redress of any wrong done to himself, but simply to enforce a pecuniary penalty against a wrong-doer."

That a suit may be criminal in form and yet civil in its nature, or *vice versa*, is fully discussed by Mr. Justice HARLAN in *State v. Illinois Central R. Co.*, 33 Fed. Rep. 726-729. The action in that case was an information in the nature of *quo warranto*, instituted by the attorney general of Illinois, demanding of the Illinois Central Railroad by what warrant it claimed to have, use, and enjoy the powers, liberties, privileges, and franchises exercised by it in and over certain submerged portions of the lake front in the city of Chicago, and of constructing, operating, using, etc., docks, wharves, and piers in and upon said submerged lands. This action was commenced in the criminal court of Cook county, and was in form a criminal proceeding. In considering this Mr. Justice HARLAN cites approvingly and quotes from *People v. Shaw*, 13 Ill. 581, and *Ensminger v. People*, 47 Ill. 387. *People v. Shaw* was an information in nature of *quo warranto* against certain persons for usurping the office of bridge commissioners, and the question arose upon the claim of right to a change of venue as provided for civil cases. CATON, J., speaking for the supreme court of Illinois, used this language, as quoted by Mr. Justice HARLAN: "In form this is a criminal proceeding, but it is only so in form. In substance it is for the protection of the private and individual rights of the relator and others in the precinct similarly situated. . . . It is the nature of the rights to

Suit may be civil in nature though criminal in form.

be asserted and maintained to which we should look, rather than the form in which the party may be obliged to proceed to assert those rights, in giving a just interpretation to the statute." The learned justice further cites and quotes from *Ensminger v. People*, *supra*; *People v. Holtz*, 92 Ill. 428; and from *Ames v. Kansas*, 111 U. S. 460, to the effect that the information in *quo warranto* has long since ceased to be criminal in its nature, and concludes by saying: "The decision in *Ames v. Kansas*, was distinctly to the effect that the nature of the right asserted and at issue . . . furnished the test whether a proceeding was of a civil or criminal nature."

That a case may partake something of the nature of both is, as might be expected, and naturally it is not always clear which element predominates. Thus, in a civil action for damages for a tort, punitive damages are sometimes awarded. There is, **Suits may** therefore, present the double element of a redress of a **be both civil** private injury and the punishment of a public wrong; **and criminal** but, inasmuch as the full recovery goes to the injured **in nature.** party, as he controls the whole proceeding, and the form of the action is civil, it may well be inferred that the civil element predominates, and the action be considered one of a civil nature. So there are *qui tam* actions brought to recover a penalty in which part of the recovery goes to the informer. In some of these actions the informer has suffered a private injury, which is compensated by the recovery, and sometimes his interest is only that of an informer. And there are actions in which the recovery is by direction of the legislature increased above the actual compensation, and the increase is by way of penalty. Obviously, in all these there are elements of a civil as well as a criminal nature. The case of *Herriman v. Burlington, C. R. & N. R. Co.*, 57 Iowa 187, 9 Am. & Eng. R. R. Cas. 339, is a good illustration. In that case the plaintiff had been overcharged, and brought his action against the company, under the statute, for five times the overcharge. The court *held* that this was a penal action, and barred by the statute of limitations applicable thereto. Commenting on the statute it uses this language: "This, to our minds, shows very clearly that the essential object of the provisions was not to afford the aggrieved individual an adequate remedy, but to protect the public by deterring railroads from committing a misdemeanor, which a violation of the act was declared to be. The provision, then, is essentially criminal, rather than remedial. This is sufficient to enable us to determine to what the statute of limitation applies." And it also contrasts this case with an earlier case under a different statute and a different penalty, in which the judgment of the court had been that the action was of a civil and remedial, rather than a criminal, nature. Another case which well illustrates this is the recent case of *Boyd*

v. U. S., 116 U. S. 616. In this an information has been filed by the district attorney for the seizure of certain property under the revenue law. The statute provided for punishment by fine and imprisonment, and also for the forfeiture of the goods. The latter was all that was sought in this action, which in form was confessedly civil. Advantage was sought to be taken of a section of the federal statutes compelling the defendant in effect to furnish testimony. The court *held* that the proceeding could not be sustained, on the ground that the action was one of a criminal nature, and that under the fifth amendment no person in a criminal case could be compelled to be a witness against himself. Speaking for the court, Mr. Justice BRADLEY used this language: "We are clearly of opinion that proceedings instituted for the purpose of declaring a forfeiture of a man's property by reason of offences committed by him, though they may be civil in form, are in their nature criminal. In this very case the ground of forfeiture, as declared in the twelfth section of the act of 1874, on which the information is based, consists of certain acts of fraud committed against the public revenue in relation to imperial merchandise, which are made criminal by the statute; and it is declared that the offender shall be fined not exceeding five thousand dollars, nor less than fifty dollars, or be imprisoned not exceeding two years, or both; and in addition to such fine such merchandise shall be forfeited. These are the penalties affixed to the criminal acts; the forfeiture sought by this suit being one of them. If an indictment has been presented against the claimants, upon conviction the forfeiture of the goods could have been included in the judgment. If the government prosecutor elects to waive an indictment, and to file a civil information against the claimants (that is, civil in form), can he, by this device, take from the proceedings its criminal aspect, and deprive the claimants of their immunity as citizens, and extort from them a production of their private papers, or, as an alternative, a confession of guilt? This cannot be. The information, though technically a civil proceeding, is in substance and effect a criminal one. As showing the close relation between the civil and criminal proceedings on the same statute in such cases, we may refer to the recent case of *Coffey v. U. S.*, 116 U. S. 436, in which we decided that an acquittal on a criminal information was a good plea in bar to a civil information for the forfeiture of goods arising upon the same acts. As, therefore, suits for penalties and forfeitures incurred by the commission of offences against the law are of this *quasi* criminal nature, we think that they are within the reason of criminal proceedings for all the purposes of the fourth amendment of the constitution, and of that portion of the fifth amendment which declares that no person shall be compelled in any criminal case to be a witness against himself." And in a separate opinion MILLER,

J., says: "I am of the opinion that this is a criminal case within the meaning of the fifth amendment to the constitution of the United States."

These cases and considerations disclose the difference between matters of a civil and of a criminal nature, and also affirm the proposition that not the form, but the nature, of the action determines the question of removal. From them we pass to enquire, what is the nature of this action? The party plaintiff is the State. It controls the litigation. It receives all the proceeds. The action proceeds from no contractual obligation of the State. It is not to enforce any rights of it as an individual. It is purely governmental in its nature. Its aim is to punish for a violation of the criminal laws of the State. The act defines "extortion," and declares it to be a "misdemeanor." Both sections 26 and 27 provide simply for punishment. The form of the action prescribed in the two sections is different, but the purpose of each is the same,—to compel obedience to the laws of the State by punishment for a violation thereof. There is no individual right to be asserted; no private injury to be compensated or redressed. The proceeding under each section is by the State in its governmental capacity to compel obedience to its laws. The language in each section is, "the party guilty; language apt for criminal purposes, and not for civil. The State, under section 27, sues not to recover for goods sold, for work done, on account of contract broken, or any private obligation of the defendant to the State, but simply and solely to impose punishment for violation of law. Can there be a doubt, under the distinctions heretofore adverted to, that this is an action of a criminal, rather than of a civil, nature? If it be said that many courts have held, and that the statutes of Iowa provide, that a civil action may be brought to recover a penalty or forfeiture it must also be observed that thereby only the form of the action is determined, but not its purpose or nature. I shall not attempt to notice the multitude of authorities which are cited, simply observing that many of them consider only the question of the form of the action, and not its nature, while those that do discuss the nature of the action must be considered as overruled by the latter enunciations of the supreme court. If congress had intended that the mere form of the action determined the right of removal, apt language would have been, "actions civil in form," or perhaps the more general expression, "civil actions;" but when the language is, "of a civil nature," it discloses an intent, as affirmed by the cases of *Ames v. Kansas*, 111 U. S. 460, and *State v. Illinois Cent. R. Co.*, 33 Fed. Rep. 726, that the court should always look beyond the matter of form to the purpose, object, nature of the action. Nor is it strange that this language was selected. While it may be within the power of congress to

transfer to the federal court all actions to enforce the penal laws of the State in which questions of a federal nature may arise, yet a due regard for the dignity of the State and a proper harmony between the State and federal governments, doubtless prompted congress to leave to the State courts the primary decision of all such actions, preferring that if a party thought any such rights were denied in the State courts he should seek relief through the appellate jurisdiction of the supreme court of the United States. That such is a fitting mode of procedure may be conceded, and that such was the intent of congress is indicated by the language that is used.

It is said that in the case of *Mugler v. State*, and *Ziebold v. State*, 123 U. S. 623, the supreme court impliedly recognized the right to remove a bill in equity filed to enjoin the operation of a brewery which though in form civil in its nature, was clearly an action to enforce the penal laws of the State. In reply to this it may be said that in *Schmidt v. Cobb*, 119 U. S. 286, an order remanding a similar case was affirmed in the supreme court by a divided vote; that the cases of *Mugler* and *Ziebold* were considered and decided together; that the *Mugler* case was on appeal from the supreme court of Kansas; and that in the *Ziebold* case counsel preferred to discuss and have determined the absolute rights of the parties, rather than any question of form or removal. So that the question of removal seems not to have been considered by the court.

And now it becomes necessary to notice the last utterance of the supreme court, in the case of *State of Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265. That case was this: The State of Wisconsin brought an action in one of her own courts against the defendant, to recover a penalty prescribed by the statutes for a transaction of insurance business in the State without a license. The action was a civil action in form, to wit, an action of debt. The statutes provided that one-half the penalty should go to the State, and one-half to the insurance department, to cover expenses, etc. Judgment was recovered in that action for the amount of the penalty. The defendant was a citizen of the State of Louisiana. Thereupon the State of Wisconsin brought an original action in the supreme court of the United States against the defendant, a citizen of another State, on that judgment. It will be seen that that action is somewhat removed from this in that, not being an original action to recover a penalty, it was to recover on a judgment in a civil action for a penalty. By the constitution of the United States the supreme court has original jurisdiction of controversies between a State and a citizen of another State. Yet notwithstanding this general jurisdiction of the supreme court, it held that it had no jurisdiction of this action. Several lines of argument were followed by the court in

reaching its conclusion. It held that that grant of jurisdiction was of judicial power, and was not intended to confer upon the courts of the United States jurisdiction of a suit or prosecution by the one State of such a nature that it could not, on the settled principle of public and international law, to be entertained by the judiciary of another State at all; that the enforcement of the criminal laws of a State was by such principles limited exclusively to the courts of the State whose laws were charged to have been violated; and that the form of the action prescribed was immaterial,—courts looking ever to the substance, nature, and purpose of the action; and that in the case at bar, although the form of the action was civil, being an action of debt to recover on a judgment in an action of debt for a penalty, it was in substance of a criminal nature, and an effort upon the part of the State to enforce its criminal laws. The language of the court is as follows: "The statute of Wisconsin under which the State recovered in one of her own courts the judgment now and here sued on, was in the strictest sense a penal statute, imposing a penalty upon any insurance company of another State doing business in the State of Wisconsin without having deposited with the proper officer of the State a full statement of its property and business during the previous year. Rev. St. Wis. §1920. The cause of action was not any private injury, but solely the offence committed against the State by violation of her law. The prosecution was in the name of the State, and the whole penalty, when recovered, would accrue to the State, and be paid, one-half into her treasury, and the other half to her insurance commissioner, who pays all expenses of prosecuting for and collecting such forfeitures. St. Wis. 1885, c. 395. The real nature of the case is not affected by the forms provided by the law of the State for the punishment of the offence. It is immaterial whether by the law of Wisconsin the prosecution must be by indictment or by action; or whether, under that law, a judgment there obtained for the penalty might be enforced by execution, by *scire facias*, or by a new suit. In whatever form the State pursues her right to punish the offence against her sovereignty, every step of the proceeding tends to one end,—the compelling the offender to pay a pecuniary fine by way of punishment for the offence." Though this case is not precisely in point, yet the thought underlying it, the principle which controlled the decision, is applicable here; and it must be adjudged that in the opinion of the supreme court of the United States—the ultimate authority on questions of this kind—an action to enforce a penalty, whatever may be its form, is one of a criminal nature. As such, within the removal act, it is not a removable case. My conclusion therefore is that this action is not one that can be removed to the federal courts, and the motion to remand must be sustained.

I have given this subject long and patient examination in view of the vast interests and the importance of the question, and, against my first impressions, I have been forced to the conclusion I have thus announced. I appreciate fully what counsel urge of the difficulties which, as they say, such a construction will place in the way of their reliance upon the protection of the federal constitution; but, notwithstanding these difficulties, back of all the statutes, and all the litigation in the State, stands that high tribunal, the federal supreme court, which will ultimately determine and fully protect all rights guaranteed to the defendant by the federal constitution

The motion to remand will be sustained. The same order will be entered in all the cases of a similar nature now pending in this court.

Judge SHIRAS concurs in the foregoing opinion. Judge LOVE gives no opinion.

INDEX.

NOTE.—The mode of citing the American and English Railroad Cases is as follows :

37 Am. & Eng. R. Cas.

The index contains references to the decisions and to the notes. References to the decisions are to the pages upon which the cases begin. References to the notes are to the pages upon which the propositions stated in the index are found.

ACTION.

Malicious motive of plaintiff. 230 n.

ADVERSE POSSESSION. See **CULVERTS.**

AGENT. See **TICKETS AND FARES**

Adoption of unauthorized Contract. 278 n.

Apparent authority of agent. 278 n.

Carriers. Agent's authority to contract to ship to destination over connecting line. Evidence. *Hanson v. Flint, etc. R. Co.* (Wis.) 628.

Conductor placing wounded man in charge of physician; liability of company for services rendered. *Terre Haute, etc. R. Co. v. Stockwell* (Ind.) 278.

Corporate contract. Circular issued offering reward. Offer held to be that of company, and not of superintendent. *Central R. & B. Co. v. Cheatham* (Ala.) 282.

Employment of attorney. 278 n.

Medical services. Employment by agent. 282 n.

Physician employed by conductor; employment held to cover all proper services which physician rendered. *Terre Haute etc. R. Co. v. Stockwell* (Ind.) 278.

Reward for detection of persons obstructing track; superintendent has authority to offer.

AGENT.

Central R. & B. Co. v. Cheatham (Ala.) 282.

Reward offered by agent for detection of certain persons; admissibility of evidence to show that the offer was that of the company. *Central R. & B. Co. v. Cheatham* (Ala.) 282.

Reward offered by superintendent. Evidence as to circulars being posted admissible to show that company was cognizant. *Central R. & B. Co. v. Cheatham* (Ala.) 282.

ANIMALS. See **CROSSINGS.**

ANNOTATION.

Action.

Malicious motive of plaintiff. 230.

Agent.

Adoption of unauthorized contract. 278.

Apparent authority of agent. 278.

Employment of attorney. 278.

Medical services. Employment by agent. 282.

Attorney.

Employment of attorney. 277. 278.

Baggage.

Checks. Depot company. 237.

Liability for loss. 237. 238.

Limiting liability. 227.

Loss. Measure of damages. 237.

ANNOTATION.

Baggage—Continued.

Overweight; extra compensation for. Emigrant. 338.

Bridge.

Construction and sufficiency of bridges. 253.
Construction of bridge. Repairs.
Obstruction of navigation. 244.
Flooding lands. Damages. 253.
Navigable streams. Construction of bridges. 244.
Navigable waters between states.
Power of congress. 244.

Carriers.

Bill of lading. Construction.
Lex loci contractus. 704.
Common carriers; who are. 704.
Connecting lines. Change in way bill. 632.
— Freight line. 631.
— Liability for loss or damage. 631, 632.
— Special directions. Lien for freight charges. 628.
— Transfer to connecting carrier. Venue of action. 632.
Delivery in terms of order by consignee held sufficient. 720.
Delivery to consignee. Notice of arrival. 649.
Insurance. Subrogation. 671.
Limitation of liability. Constitutional and statutory prohibition. 659.
— Estoppel. 645.
— Signature to condition in bill of lading. 645.
Rates. Discrimination. Difference in quantity. 625.
— Discrimination. Other considerations. 624.
Stoppage in transitu. Constructive delivery by endorsement of bill of lading. 715.
— Effect of levy of attachment by creditor of consignee. 714.
— Insolvency of buyer at time of sale. 714.
— Priority of right as against carrier's lien. 714.
— Sufficiency of notice. 714.
— Termination of transit. 714.
— Who may exercise the right. 715.

Children.

Contributory negligence of children. 329, 336.

ANNOTATION.

Children—Continued.

Crossing track. Contributory negligence. 341.
Injuries to children. Right of action. 299.
— Turn tables. 341.
Injuries to infant. 335.
Negligent killing of infants. 329.
Trespassing on railroad track. 329.

Constitutional Law.

Claims for damages. Vested rights.
Eminent domain. 356.
— Vested rights. Injuries causing death. 356.

Contributory Negligence.

Children; contributory negligence of. 329, 336.
— Crossing track. 341.
Personal injuries. Contributory negligence. 306.
Sufficiency of finding. 306.

Crossing.

Alteration of crossing. Appeal. 453.
Boy killed at crossing. Sufficiency of evidence. 522.
Children. Crossing track. Contributory negligence. 341.
Construction and maintenance. 462.
Contributory negligence. Failure to look. Province of jury. 509.
— Gross negligence. Instruction. Province of jury. 510.
— Neglect of flagman's signal. 509.
— Open gates. 510.
— Open gates. Failure to look and listen. 508.
— Standing upon defective foot board of wagon. 509.
Defective crossings. Competency of evidence. 462.
— Sufficiency of evidence. 461.
Obstructing highway. Frightening horses. Pleading. 515.
Obstructing crossing. Horses taking fright at cars. 516.
— Negligence. 469.
Signals. Frightening horses. 488.
— Frightening horses. Action for penalty. 489.
— Negligent act of flagman. 489.
— Who are entitled to benefit of. 470.
Speed; duty to slacken. 478.
Unavoidable accident. Instruction. 510.

ANNOTATION.

- Culvert.**
 - Sufficiency of culvert. 253.
- Damages.**
 - Claim for damages. Vested rights. Eminent domain. 356.
 - Excessive damages for personal injuries. 199.
 - Exemplary damages. Expulsion of passengers. 126, 198.
 - Instruction. 198.
 - Torts of servants; recovery of exemplary damages for. 171.
 - When recoverable. 198.
 - Personal injuries. Disease developed or aggravated by injury. 352.
 - Peril and fright. 193.
 - Pleading. Instruction. 136.
- Death.**
 - Claims for damages. Vested rights. 356.
 - Missouri statute as to injuries causing death; construction of. 359.
 - Negligence causing death. Statutory liability. 347.
- Eminent Domain.**
 - Claims for damages. Vested rights. 356.
 - Delegation of power. Effort to agree. 446.
- Estoppel.**
 - Limitation of carrier's liability. 645.
- Evidence.**
 - Derailment of train. Res gestæ. 136.
 - Personal injuries. Condition of family. 186.
- Fence.**
 - Frightening horses. Injury owing to failure to fence. 489.
- Interstate Commerce.**
 - Interstate commerce act. Indictment. 625.
- License.**
 - Implied license to go on track. 312.
- Lease.**
 - Unauthorized lease. Liability of lessor. 16.
- Limitations, Statute of.**
 - Amendment of complaint. 125.
- Mandamus.**
 - Municipal aid. Taxation. 405.
- Master and Servant.**
 - Defective switches. Unblocked frogs. Injuries to employes. 347.

ANNOTATION.

- Officers.**
 - Attorney; employment of. 278.
 - Directors. Compensation for extra services. 277.
- Ordinance.**
 - Validity of municipal ordinances. 494.
- Passengers.**
 - Alighting from and boarding stationary train. 86.
 - Alighting. Reasonable time. 85.
 - Arrest of disorderly persons. Statutory authority. 116.
 - Carrying beyond destination. Natural consequences of injury. Burden of proof. 186.
 - Collision. Negligence of carrier not imputed to passenger. 44.
 - Connecting lines. Liability in the carriage of passengers. 32.
 - Contributory negligence. Absence of employes. 94.
 - Alighting from moving train. 93.
 - Alighting from train. Non-suit. 85.
 - Alighting from train. Province of jury. 86.
 - Arm projecting from car window; injury to passenger riding with. 172.
 - Assuming dangerous position while doing dangerous act at bidding of conductor. 81.
 - Boarding moving street car. 206.
 - Boarding moving train. 81.
 - Boarding moving train. Crossing tracks. 81.
 - Boarding moving train. Direction of conductor. 81.
 - Boarding moving train. Statement of conductor. 81.
 - Entering car. Absence of stepping stool. 86.
 - Pleading. 171.
 - Presumption of. 81.
 - Province of jury. 179.
 - Riding on foot board of street car. Province of jury. 206.
 - Travelling on platform. 60.
- Defective switches.** Unblocked frogs. 347.
- Defective track.** Condition of track. Unprecedented weather. 135.

ANNOTATION.

Passengers—Continued.

- Negligence in maintaining. 135.
 - Derailment of train. Negligence. Province of jury. 135.
 - Weight of evidence. 136.
 - Diseased person; injury to. Liability of company. 140.
 - Exemplary damages; recovery of for torts of servants. 171.
 - Expulsion. Contributory negligence. 125.
 - Delirious passenger. 121.
 - Disorderly passengers. 116.
 - Exemplary damages. 198.
 - Explanation by passenger Officer. Pleading. 126.
 - Infectious disease; removal of passenger suffering from. 121.
 - Intoxicated passengers, expulsion of. 117.
 - Liability of company. 125.
 - Measure of damages. 125, 186.
 - Place. Usual stopping place. 128.
 - Place. Where expulsion may take place. 128.
 - Punitive damages. 126.
 - Sale of nontransferable ticket. 125.
 - Unnecessary force. 126.
 - Jumping from train through fright. 193.
 - Person accompanying live stock; right of. 53.
 - Contributory negligence. 53.
 - Drover's pass. Liability of company. 53.
 - Personal injuries. Derailment of train. *Res gestæ*. 135.
 - Regulations. Sufficiency of notice. 108.
 - Station accommodations. Safety and sufficiency. 66.
- Penalty.**
- Frightening horses. Action for penalty. 489.
 - Injuries causing death. Construction of Missouri statute. 359.
- Railroad Commissioners.**
- Authority and jurisdiction of State railroad commissioners. 607.
 - Establishment of freight charges. Appeal. 607.
 - Suit against commissioners. 600.

ANNOTATION.

Receiver.

- Leave to sue receiver. 8.
- Liability of company for receiver's acts. 12.

Reward.

- When reward is earned. 287.

Rules and Regulations.

- Notice; sufficiency of. 108.
- Rules and regulations of railroad companies. 234.

Signals.

- Frightening horses. Negligent act of flagman. 489.
- Statutory signals. 488.
- Statutory signals; who entitled to benefit of. 470.

Speed.

- Validity of municipal ordinances. 494.

Station.

- Personal injuries in railroad company's yards. Contributory negligence. 306.

STOPPAGE IN TRANSITU. See CARRIERS.**Taxation.**

- Assessment of railroad as a unit. 420.
- Bridges; assessment of. 410.
- Bridge over Missouri river. 410.
- Constitutional law. Title of act. 405.
- Exemption. Constitutional law. 392.
- Construction of charter clause. 394, 395.
- Special assessments. 400.
- Gross receipts. Interstate commerce. 268.
- License and privilege taxes. 413.
- Municipal ordinance. 378.
- Municipal aid. *Mandamus*. 405.
- National corporations. 374.
- Rolling stock. 374.
- School taxes. Construction of Missouri statute. 418.
- Subscription in aid. Sale of road. 405.

Tickets.

- Detaching return coupon. 99.
- Expulsion of passenger for defect in ticket. 99.
- Mistake of agent in stamping ticket. 99.
- Mistake of conductor. 99.
- Sale of nontransferable ticket. 125.

STOPPAGE IN TRANSITU.

Tickets—*Continued*.

Wrongful refusal to accept ticket. 99.

Trespassers.

Children trespassing on railroad track. 329.

Contributory negligence; deaf man walking on track and run over by train held guilty of. 291.

—— Intoxicated person. 312.

—— Intoxicated person. Sleeping on track. 312.

—— Sufficiency of finding. 306.

Deaf person; liability for injury to. 291.

Liability of company to trespassers. 294.

Licensees upon track. Liability of company. 319.

Turn Table.

Children; injuries to. 341.

Waters.

Flooding lands. Damages. 253.

—— Evidence of negligence. 253.

Surface waters; obstruction of. 272.

ARREST. See PASSENGERS.

ASSAULT. See PASSENGERS.

ATTORNEY. See OFFICERS.

Argument of counsel. See PLEADING AND PRACTICE.

Employment of attorney. 278 n.

BAGGAGE.

Affidavit as to contents; pedler refusing to make so as to have agent refuse to check trunk so that he could sue company. *Norfolk & W. R. Co. v. Irvine*, (Va.) 227.

Certificate as to contents; railroad may require of pedler. *Norfolk & W. R. Co. v. Irvine*, (Va.) 227.

Checks. Depot company. 237 n.

Fire. Warehouse. Baggage warehoused while passenger stops over; carrier held not liable for loss by fire. *Laffrey v. Grummond*, (Mich.) 235.

Liability for loss. 237 n, 238 n.

Limiting liability. 227 n.

—— Limitation contained in ticket signed by passenger but not read, held valid. *Bate v. Canadian Pac. R.*, (Ont.) 208.

Loss. Measure of damages. 237 n.

BAGGAGE.

Overweight; extra compensation for. *Emigrant*. 238 n.

Regular stopping place; refusal to deliver baggage at; jury may award exemplary damages. *Pittsburgh etc. R. Co. v. Lyon*, (Pa.) 231.

Regulation of company having five stations in city only to check baggage to terminal station, unreasonable. *Pittsburgh etc. R. Co. v. Lyon*, (Pa.) 231.

BILL OF LADING. See CARRIERS.

Bill made in New York for goods shipped by English steamship governed by laws of the United States. *Liverpool etc. S. Co. v. Phenix Ins. Co.*, (U. S.) 681.

BOND. See RECEIVERS.

BRIDGE. See CULVERTS.

Construction and sufficiency of bridges. 253 n.

Construction of bridge. Repairs.

Obstruction of navigation. 244 n.

Flooding lands. Damages. 253 n.

Inspection. Duty of company to test material and to inspect bridges from time to time. *Louisville etc. R. Co. v. Snider*, (Ind.) 137.

Navigable river; power of State to authorize building of bridge over, obstructing navigation. *Green etc. Nav. Co. v. Chesapeake etc. R. Co.*, (Ky.) 238.

Navigable streams. Construction of bridges. 244 n.

Navigable waters between States. Power of congress. 244 n.

Navigation company held to acquire only exclusive right to use of improvements. State might construct bridge across river. *Green etc. Nav. Co. v. Chesapeake etc. R. Co.*, (Ky.) 238.

Obstruction of navigation caused by repair of railroad bridge held to be *damnum absque injuria*. *Green etc. Nav. Co. v. Chesapeake etc. R. Co.*, (Ky.) 238.

Obstruction of stream causing overflow on land; company liable therefor. *McCleneghan v. Omaha etc. R. Co.*, (Neb.) 245.

Sufficiency. In construction of bridges regard must be had to rights of land owners and safety of public. *McCleneghan v.*

BRIDGE.

Omaha etc. R. Co., (Neb.) 245.
Taxation. See TAXATION.

CARRIERS. See BAGGAGE; EXPRESS COMPANIES; WAREHOUSEMAN

Generally.

Bill of lading. Construction. *Lex loci contractus*. 704 n.

Common carriers; who are. 704 n.

— Owner of ocean steamer held to be, with liability of insurer. Liverpool etc. S. Co. v. Phenix Ins. Co., (U. S.) 681.

Delivery to consignee. Notice of arrival. 649 n.

— Placing cotton on platform without notice; company liable under statute for destruction by fire. Missouri Pac. R. Co. v. Haynes, (Tex.) 645.

— Factor of consignor, who is consignee of goods, is trustee of an express trust under statute and may maintain an action for wrongful delivery. Wolfe v. Missouri Pac. R. Co. (Mo.) 715.

— in terms of order by consignee held sufficient. 720 n.

— against order of consignee, held to be without authority and at the risk of the carrier. Wolfe v. Missouri Pac. R. Co. (Mo.) 715.

Extortion. Civil action for penalty imposed by statute upon railroad companies for extortion is, notwithstanding its form, criminal in its nature and is not removable to federal courts. State v. Chicago etc. R. Co. (C. C.) 721.

Lien for charges by connecting road other than one over which shipper directed goods to be sent. Price v. Denver etc. R. Co., (Colo.) 626.

Connecting Lines.

Agent's authority to contract to ship to destination over connecting line. Evidence. Hanson v. Flint etc. R. Co., (Wis.) 628.

Change in way bill. 632 n.

Contract to carry to destination. Liability of first carrier not released by warehousing goods at terminus. Hanson v. Flint etc. R. Co., (Wis.) 628.

Freight line. 631 n.

CARRIERS.

Connecting Lines—Continued.

Interchange of traffic. Contract of street railway to make connections so long as it receives fare allowed by law. Buffalo etc. R. Co. v. Buffalo St. R. Co., (N. Y.) 200.

Liability for loss or damage. 631 n, 632 n.

Monopoly. Contract between railroad company and line of steamers. Question of law and fact. South Fla. R. Co. v. Rhoads, (Fla.) 100.

Rates; statute reducing, held valid, notwithstanding contract between two roads for interchange of traffic. Buffalo etc. R. Co. v. Buffalo St. R. Co., (N. Y.) 200.

Shipper's directions as to route violated by initial carrier; connecting carrier's right to charges and lien. Price v. Denver etc. R. Co., (Colo.) 626.

Special contract to deliver goods at point on. Connecting line liable for injury by freezing. Fox v. Boston & M. R. Co., (Mass.) 632.

Special directions. Lien for freight charges. 628 n.

Transfer to connecting carrier. Venue of action. 632 n.

Insurance.

Agreements between shipper, carrier and insurance company construed. Carrier not entitled to plead that it had not received benefit of insurance. Inman v. South Carolina R. Co., (U. S.) 663.

Condition of contract. Carrier cannot insist on right to benefit of insurance as condition of transportation. Ins. Co. v. Easton, (Tex.) 671.

Contract for carriage partly by rail and partly by vessel; under bill of lading steamship company held not to have benefit of insurance. Liverpool etc. S. Co. v. Phenix Ins. Co., (U. S.) 681.

Stipulation. Agreement between insured and carrier that latter shall be subrogated to right of insured held to avoid the policy. Ins. Co. v. Easton, (Tex.) 671.

Subrogation. 671 n.

CARRIERS.

Insurance—Continued.

— Clause that insurance should not inure to carrier's benefit; reliance on by insurance company although carrier had no notice. *Ins. Co. v. Easton*, (Tex.) 671.

— Insurer on paying loss becomes, without any form or assignment, subrogated to insured's rights against carrier. *Liverpool etc. S. Co. v. Phenix Ins. Co.*, (U. S.) 681.

— Provision that insurance shall not inure to benefit of any carrier held valid. *Ins. Co. v. Easton*, (Tex.) 671.

— When carrier cannot take advantage of clause that company incurring liability should have benefit of insurance. *Inman v. South Carolina R. Co.*, (U. S.) 663.

Limitation of Liability.

Condition in receipt requiring presentation of claim; shipper not signing receipt not bound by, under statute. *Hartwell v. Northern Pac. Ex. Co.*, (Dak.) 635.

Constitutional and statutory prohibition. 659 n.

Constitutional prohibition. Railroad cannot limit its liability by special agreement. *Missouri Pac. R. Co. v. Vandeventer*, (Neb.) 651.

Estoppel. 645 n.

Foreign law denying power to make exemption; necessity of pleading. *Liverpool etc. S. Co. v. Phenix Ins. Co.*, (U. S.) 681.

For negligence of servants, invalid, notwithstanding validity by *lex loci contractus*. *Liverpool etc. S. Co. v. Phenix Ins. Co.*, (U. S.) 681.

Negligence of servants. No general maritime law, recognizing validity of stipulation. *Liverpool etc. S. Co. v. Phenix Ins. Co.*, (U. S.) 681.

Perils at sea arising from negligence of master and crew. Limitation invalid. *Liverpool etc. S. Co. v. Phenix Ins. Co.*, (U. S.) 681.

Signature to condition in bill of lading. 645 n.

Termination of transit. Regulation

CARRIERS.

Limitation of Liability—Continued.

fixing period when company is only liable as warehouseman, held valid. *Western R. Co. v. Little*, (Ala.) 659.

Rates.

Courts have no power to make tariffs. *Pensacola & A. R. Co. v. State*, (Fla.) 579.

Courts will not interfere when rates fixed by commissioners are not assailed as an entirety. *Pensacola & A. R. Co. v. State*, (Fla.) 579.

Constitutional law. Conferring on commissioners power to make rates not a delegation of legislative power. *McWhorter v. Pensacola & A. R. Co.*, (Fla.) 566.

Discretion of commissioners in fixing rates. Whether rates are remunerative. Court cannot interfere. *Pensacola & A. R. Co. v. State*, (Fla.) 579.

Discrimination. Difference in quantity. 625 n.

Injunction; courts will not interfere by, with railroad commissioners discretion in making rates. *McWhorter v. Pensacola & A. R. Co.*, (Fla.) 566.

Penalty; bill to enjoin suit by commissioners to recover. held to constitute a suit against the State. *McWhorter v. Pensacola & A. R. Co.*, (Fla.) 566.

Railroad commissioners; bill to enjoin from promulgating rates held not a suit against the State. *McWhorter v. Pensacola & A. R. Co.*, (Fla.) 566.

Reasonableness of; effect of provision that schedule fixed by commissioners shall be deemed evidence of. *Pensacola & A. R. Co. v. State*, (Fla.) 579.

Reasonableness of, made by commissioners not open to inquiry in suit to enjoin discretionary action. *McWhorter v. Pensacola & A. R. Co.*, (Fla.) 566.

Unreasonable rates. Enforcement of tariff which will not pay operating expenses, is a taking of property without compensation. *Pensacola & A. R. Co. v. State*, (Fla.) 579.

CARRIERS.**Stoppage in Transitu.**

Attachment levied by carrier for arrearages of freight does not defeat right of stoppage. *Farrell v. Richmond & D. R. Co. (N. Car.)* 704.

Constructive delivery by endorsement of bill of lading. 715 *n.*

Effect of levy of attachment by creditor of consignee. 714 *n.*

Insolvency of buyer at time of sale. 714 *n.*

Insolvency of consignees of goods does not defeat right of stoppage, when vendors were ignorant thereof. *Farrell v. Richmond & D. R. Co. (N. Car.)* 704.

Priority of right as against carrier's lien. 714 *n.*

Stipulation that carrier shall have lien on goods for all arrearages due, is subordinate to consignor's right of stoppage. *Farrell v. Richmond & D. R. Co. (N. Car.)* 704.

Sufficiency of notice. 714 *n.*

Termination of transit. 714 *n.*

Verbal pledge of goods by consignee to secure arrearages of freight, held not a sufficient delivery by carrier to defeat right of stoppage. *Farrell v. Richmond & D. R. Co. (N. Car.)* 704.

Who may exercise the right. 715 *n.*

CHANCERY. See **EQUITY.****CHARTER.** See **STOCKYARDS.****CHILDREN.** See **PASSENGERS.**

Boy injured by train colliding with cars on which he was playing. Company held not liable. *Williams v. Kansas City etc. R. Co., (Mo.)* 329.

Child on track. Fireman may testify whether child had time to get off after signal was given. *Kansas Pac. R. Co. v. Whipple, (Kan.)* 320.

Contributory negligence of children. 329 *n.*, 336 *n.*

— Child capable of exercising judgment responsible for exercise of care. *Twist v. Winona etc. R. Co., (Minn.)* 336.

— Child incapable of exercising judgment cannot be charged with. *Twist v. Winona etc. R. Co., (Minn.)* 336.

37 A. & E. R. R. Cas.—47

CHILDREN.

— Child nine years of age must exercise such care as its capacity fits it for exercising. *Western & A. R. Co. v. Young, (Ga.)* 489.

— Child playing on turn table injured by catching his foot held guilty of. *Twist v. Winona etc. R. Co., (Minn.)* 336.

— Infants of tender years; less discretion required from degree depends upon age and knowledge. *Kansas Pac. R. Co. v. Whipple, (Kan.)* 320.

— Less discretion required of infant; degree depends upon his age and knowledge. *Kansas Pac. R. Co. v. Whipple, (Kan.)* 320.

Crossing track. Contributory negligence. 341 *n.*

Evidence. Mother as witness in suit by father of minor child for latter's separate use and benefit. *Lapline v. Morgan's etc. Co., (La.)* 348.

Injuries to infant. 335 *n.*

— Right of action. 299 *n.*

— Turn tables. 341 *n.*

Negligent killing of infants. 329 *n.*

Personal injuries; damages for. Child nine years of age deprived of a member; pain, disfigurement and impaired capacity should be considered. *Western & A. R. Co. v. Young, (Ga.)* 489.

— Hereditary predisposition to disease; injury aggravated by; party in fault liable for entire damage. *Lapline v. Morgan's etc. Co., (La.)* 348.

— Two rights of action arise under statute, one in favor of infant and one in favor of parent. *Sibley v. Ratliffe, (Ark.)* 295.

Trespassing on railroad track. 329 *n.*

— Employes not bound to watch and discover boy playing in switch yard. *Williams v. Kansas City etc. R. Co., (Mo.)* 329.

— Instruction that plaintiff could recover, although negligent, if accident could have been prevented by reasonable care, held erroneous. *Williams v. Kansas City etc. R. Co., (Mo.)* 329.

CHILDREN.

— Wanton injury after child's presence was discovered by engineer. Liability of company. *Kansas Pac. R. Co. v. Whipple*, (Kan.) 320.

COLLISION. See **PASSENGERS.**

CONFLICT OF LAWS. See **CARRIER.**

CONNECTING LINES. See **CARRIERS; PASSENGERS.**

CONSTITUTIONAL LAW. See **TAXATION.**

Alteration of grade crossings; Connecticut act providing for is valid exercise of police power of State. *Westbrook v. New York etc. R. Co.*, (Conn.) 446.

Carriers. Limitation of liability. Railroad cannot limit its liability by special agreement. *Missouri Pac. R. Co. v. Vandeventer*, (Neb.) 651.

Claims for damages. Vested rights. Eminent domain. 356 n.

— Vested rights. Injuries causing death. 356 n.

Delegation of legislative power; statute conferring on commissioners power to make rates, is not. *McWhorter v. Pensacola & A. R. Co.*, (Fla.) 566.

Rates; statute reducing held valid notwithstanding contract between two roads for interchange of traffic. *Buffalo etc. R. Co. v. Buffalo St. R. Co.*, (N. Y.) 200.

Regulation of charges. Enforcement of tariff which will not pay operating expenses is a taking of property without compensation. *Pensacola & A. R. Co. v. State*, (Fla.) 579.

Special legislation. Exception of roads at seaside resorts from act providing for appointment of receiver. *Delaware etc. R. Co. v. Markley*, (N. J.) 421.

Statute limiting liability for personal injuries accepted by company. Power to repeal. *Pennsylvania R. Co. v. Bowers*, (Pa.) 353.

CONTRACT. See **AGENT; OFFICERS.**

Monopoly. Contract between railroad company and line of steamers. Question of law and fact.

CONTRACT.

South Fla. R. Co. v. Rhoads, (Fla.) 100.

CONTRACTOR.

Crossing. Injury. Verdict against company and contractor; verdict over against contractor for amount of company's liability. *Dallas etc. R. Co. v. Able*, (Tex.) 453.

CONTRIBUTORY NEGLIGENCE. See **CHILDREN; CULVERTS; PASSENGERS; STATION; TRESPASSERS.**

Adult must give that care and attention for his own protection that is ordinarily expected. *Kansas Pac. R. Co. v. Whipple*, (Kan.) 320.

Brick yard employe pushing car and run over by other cars not guilty of contributory negligence. *Iltis v. Chicago etc. R. Co.*, (Minn.) 299.

Children. See that heading.

Personal injuries. Contributory negligence. 306 n.

Reckless or wanton injury not excused by fact that one has put himself in danger. *Kansas Pac. R. Co. v. Whipple*, (Kan.) 320.

Sufficiency of finding. 306 n.

CONVEYANCE.

"Right of way;" words in grant describe the tenure not the land granted. *Atlantic etc. R. Co. v. Lesueur*, (Ariz.) 368.

CORPORATION.

Refusal to perform duty. One corporation seeking redress on ground that another has refused to perform duty. What must be shown. *Delaware etc. R. Co. v. Central etc. Co.*, (N. J.) 607.

— Unless duty has been created by usage, contract or statute, courts cannot be called upon. *Delaware etc. R. Co. v. Central etc. Co.*, (N. J.) 607.

CROSSINGS. See **STREETS AND HIGHWAYS; TRESPASSERS.**

Generally.

Boy killed at crossing. Sufficiency of evidence. 522 n.

Children. Crossing track. Contributory negligence. 341 n.

Construction and maintenance. 462 n.

CROSSINGS.

Generally—Continued.

Crossing of two roads. Effort to agree as to point or manner of crossing; what is not an averment as to. *Lake Shore etc. R. Co. v. Cincinnati etc. R. Co.*, (Ind.) 430.

— Effort by companies to agree must be alleged in petition. *Lake Shore etc. R. Co. v. Cincinnati etc. R. Co.*, (Ind.) 430.

Cutting rail with cold chisel. By-stander injured by piece of iron striking him on the eye, held entitled to recover. *Chicago etc. R. Co. v. Harper*, (Ill.) 549.

Detaching train. Party killed by rear portion after engine had ran on ahead; company held not liable. *Chicago etc. R. Co. v. Hedges*, (Ind.) 516.

Flagman; ordinance requiring may be passed and enforced by city under general grant of police power. *Western & A. R. Co. v. Young*, (Ga.) 489.

— Surroundings at crossing held to warrant finding of negligence in not providing. *Freeman v. Duluth etc. R. Co.*, (Mich.) 501.

Gates; statutory obligation to maintain. Horses going on track. Company held liable for breach of obligation. *Charman v. Southeastern R. Co.*, (Eng.) 495.

Heap of refuse on land adjoining highway likely to frighten horses held a nuisance. *Brown v. Eastern etc. R. Co.*, (Eng.) 558.

Obstructed view; conduct of person approaching crossing with, held to entitle him to recover. *Close v. Lake Shore etc. R. Co.*, (Mich.) 522.

— Duty and liability of company obstructing crossing with freight cars when traveller is injured. *Close v. Lake Shore etc. R. Co.*, (Mich.) 522.

Penalty; statute providing for, in case of death of passenger not applicable to person killed at crossing. *Crumpley v. Hannibal etc. R. Co.*, (Mo.) 357.

Precautions prescribed by statute or ordinance; negligence as a matter of law for a railroad not to use. *Western & A. R. Co. v. Young*, (Ga.) 489.

CROSSINGS.

Generally—Continued.

Speed; duty to slacken. 478 *n*.

— Evidence offered in rebuttal to testimony of defendant's witnesses that speed was the same as it had been for ten days. *Close v. Lake Shore etc. R. Co.*, (Mich.) 522.

— Ordinance regulating, may be passed and enforced by city under general grant of police power. *Western & A. R. Co. v. Young*, (Ga.) 489.

Unavoidable accident. Instruction. 510 *n*.

Alteration of Crossings.

Appeal. 453 *n*.

Leased road is road of lessee within meaning of statute. *Westbrook v. New York etc. R. Co.*, (Conn.) 446.

Notice of petition to be given to town, necessity of. *Westbrook v. New York etc. R. Co.*, (Conn.) 446.

Object of statute providing for, is to remove sources of danger and act is valid. *Westbrook v. New York etc. R. Co.*, (Conn.) 446.

Objection that application was not authorized by directors and not in due form, is plea in abatement. *Westbrook v. New York etc. R. Co.*, (Conn.) 446.

Petition by directors of company; what is sufficient compliance with statute authorizing. *Westbrook v. New York etc. R. Co.*, (Conn.) 446.

Petition for alteration by directors; when sufficiently authorized under statute. *Westbrook v. New York etc. R. Co.*, (Conn.) 446.

Sufficiency of allegation in petition asking for change that directors were duly authorized. *Westbrook v. New York etc. R. Co.*, (Conn.) 446.

Injuries Caused by Defective Crossing.

Competency of evidence. 462 *n*.

Frog unblocked; person injured by catching foot in. Evidence as to devices adopted by other States admissible. *Gulf etc. R. Co. v. Walker*, (Tex.) 342.

Restoration. Contractor's duty to

CROSSINGS.

Injuries Caused, etc.—Continued.
keep crossing safe. Verdict against both company and contractor. *Dallas etc. R. Co. v. Able, (Tex.) 453.*

Contributory negligence. Plaintiff exercised care in going on track without stopping to inspect it. *Dallas etc. R. Co. v. Able, (Tex.) 453.*

Instruction that if careful driver could not drive ordinary team across railroad defendant was liable, held proper. *Dallas etc. R. Co. v. Able, (Tex.) 453.*

of road so as not unnecessarily to impair its usefulness as required by statute. Instruction considered. *Dallas etc. R. Co. v. Able, (Tex.) 453.*

Reasonable time for restoring crossing had elapsed when injury occurred. *Dallas etc. R. Co. v. Able, (Tex.) 453.*

Sufficiency of evidence. 461 *n.*

Contributory Negligence.

Child nine years of age must exercise such care as its capacity fits it for exercising. *Western & A. R. Co. v. Young, (Ga.) 489.*

Climbing over train blocking street and jumping down. Direction of trainman immaterial. *Howard v. Kansas City etc. R. Co., (Kan.) 552.*

Degree of care required of one using track to walk upon, although at the moment at a crossing. *Central R. Co. v. Raiford, (Ga.) 481.*

Duty to stop wagon which made noise and listen for train; question for jury. *Galveston etc. R. Co. v. Porfert, (Tex.) 540.*

Failure to look. Province of jury. 509 *n.*

Gross negligence. Instruction. Province of jury. 510 *n.*

Horses already across track and train 390 feet away; plaintiff guilty of negligence in not driving off track. *Galveston etc. R. Co. v. Porfert, (Tex.) 540.*

Instruction that if person in wagon assisted or controlled driver no recovery could be had, held incorrect. *Galveston etc. R. Co. v. Kutac, (Tex.) 470.*

CROSSINGS.

Contributory Negligence—Cont.

Neglect of flagman's signal. 509 *n.*

Negligence of driver of wagon not imputed to gratuitous passenger. *Galveston etc. R. Co. v. Kutac, (Tex.) 470.*

Negligence of husband driving vehicle not imputed to wife. *Hoag v. New York etc. R. Co., (N. Y.) 479.*

Obstructed view. Crossing track when smoke had settled down upon road, without waiting for its disappearance. *Heany v. Long Island R. Co., (N. Y.) 529.*

Open gates. 510 *n.*

Failure to look and listen. 508 *n.*

Party familiar with crossing killed by portion of train detached from engine which ran on ahead. *Chicago etc. R. Co. v. Hedges, (Ind.) 516.*

Person killed while crossing five tracks by locomotive of unusual construction which made no sound and gave no signal. *Palmer v. New York etc. R. Co., (N. Y.) 533.*

Standing on defective foot board of wagon. 509 *n.*

Stopping and looking; failure of driver to exercise precaution of, held contributory negligence. *Freeman v. Duluth etc. R. Co., (Mich.) 501.*

Signals.

Frightening horses. 488 *n.*

Action for penalty. 489 *n.*

By whistle sounded at crossing. Liability of company. *Bailey v. Hartford etc. R. Co., (Conn.) 483.*

Negligent act of flagman. 489 *n.*

Obligation to give signals applies only to highway crossing and not to defendant's own premises. *Casey v. Canadian Pac. R. Co., (Ont.) 172.*

Omission to give signal does not impose liability when it in no way contributes to accident. *Shoebink v. Canada A. R. Co., (Ont.) 462.*

Penalty. \$5,000, recoverable under statute for death caused by fail-

CROSSINGS.

Signals—Continued.

- ure to ring bell. *Crumpley v. Hannibal etc. R. Co.*, (Mo.) 357.
- Statute requiring signal within 80 rods of crossing; under circumstances held not negligence to give within 45 rods. *Bailey v. Hartford etc. R. Co.*, (Conn.) 483.
- Statutory requirements not applicable to trespassers. Failure to comply as evidence of negligence. *Central R. Co. v. Raiford*, (Ga.) 481.
- Who are entitled to benefit of signal. 470 n.

Obstructing Crossing and Highway.

- Box cars. Frightening horses. Complaint held sufficient. *Pittsburgh etc. R. Co. v. Kitley*, (Ind.) 511.
- Evidence. Witness in defendant's employ cannot be asked if he gave his opinion that the company was careless. *Close v. Lake Shore etc. R. Co.*, (Mich.) 522.
- Freight cars standing across highway; statutory requirements not complied with. *Pittsburgh etc. R. Co. v. Kitley*, (Ind.) 511.
- Frightening horses. Complaint need not aver what employes placed cars on track or their duty to move them. *Pittsburgh etc. R. Co. v. Kitley*, (Ind.) 511.
- Evidence of other accidents admissible. *Pittsburgh etc. R. Co. v. Kitley*, (Ind.) 511.
- Pleading. 515 n.
- Horses taking fright at cars. 516 n.
- Negligence. 469 n.
- View by jury. Proof by officer in charge that cars were not in same situation. *Close v. Lake Shore etc. R. Co.*, (Mich.) 522.

CULVERT.

- Evidence. Expert stated that culvert was the largest he had ever built. Evidence as to larger culverts of other roads. *Emery v. Raleigh & G. R. Co.*, (N. Car.) 253.
- Extraordinary rain falls; company not liable for damages resulting from. *Emery v. Raleigh & G. R. Co.*, (N. Car.) 253.
- Flooding. Adverse user. Right

CULVERT.

- to maintain culvert flooding land acquired by proof of twenty years' user. *Emery v. Raleigh & G. R. Co.*, (N. Car.) 253.
- Contributory negligence in constructing brick yard and planting crop on land formerly flooded. *Emery v. Raleigh & G. R. Co.*, (N. Car.) 253.
- Contributory negligence. Land owner not compelled to abandon land because culvert was improperly constructed and he knew it. *Emery v. Raleigh & G. R. Co.*, (N. Car.) 253.
- Estoppel; proceedings for condemnation will not operate as in an action for flooding land. *Emery v. Raleigh & G. R. Co.*, (N. Car.) 253.
- Sufficiency of Culvert. 253 n.
- Company must construct culvert which will carry off water from ordinary rains. *Emery v. Raleigh & G. R. Co.*, (N. Car.) 253.
- Evidence. Reputation of engineer constructing culvert. *Emery v. Raleigh & G. R. Co.*, (N. Car.) 253.

DAMAGES.

- Claim for damages. Vested rights. Eminent domain. 356 n.
- Excessive damages for personal injuries. 199 n.
- \$1,000 for injuries sustained by middle-aged woman held not excessive. *New York etc. R. Co. v. Doane*, (Ind.) 87.
- \$4,000, for spinal injuries likely to prove permanent. *Missouri Pac. R. Co. v. Shuford*, (Tex.) 194.
- \$6,500 not excessive for loss of one eye, *vertebrae* out of line, and slight paralysis. *Dallas etc. R. Co. v. Able*, (Tex.) 453.
- \$14,167, held not excessive for injury to leg disabling person for life. *Galveston etc. R. Co. v. Porfert*, (Tex.) 540.
- Exemplary damages. Act of servant committed maliciously and not connected with his duties. Ratification. *Dillingham v. Anthony*, (Tex.) 1.
- Baggage; refusal to deliver at regular stopping place; jury

DAMAGES.

- may award exemplary damages. *Pittsburgh etc. R. Co. v. Lyon*, (Pa.) 231.
- Expulsion of passengers. 126 *n.*, 198 *n.*
- Gross negligence must have contributed to the accident. Instruction held erroneous. *Missouri Pac. R. Co. v. Johnson*, (Tex.) 128.
- Instruction. 198 *n.*
- Instruction as to gross negligence, and ordinary care considered and held erroneous. *Missouri Pac. R. Co. v. Shuford*, (Tex.) 194.
- Negligence of servants, when malicious, oppressive, or reckless, exemplary damages may be recovered. *Quinn v. S. Car. R. Co.*, (S. Car.) 166.
- Person injured owing to track of railroad being out of repair. Instructions considered. *Missouri Pac. R. Co. v. Shuford*, (Tex.) 194.
- Torts of servants; recovery of exemplary damages for. 171 *n.*
- When recoverable. 198 *n.*
- Personal injuries. Child nine years of age deprived of a member, pain, disfigurement and impaired capacity should be considered. *Western & A. R. Co. v. Young*, (Ga.) 489.
- Disease developed or aggravated by injury. 352 *n.*
- Double recovery; award for "mental anguish" and "fright" held to give. *Galveston etc. R. Co. v. Porfert*, (Tex.) 540.
- Existing disease which aggravated injury. Plaintiff entitled to compensatory damages. *Louisville etc. R. Co. v. Snider*, (Ind.) 137.
- Future physical suffering which is reasonably certain to result. *Stutz v. Chicago etc. R. Co.*, (Wis.) 187.
- Hereditary predisposition to disease, injury aggravated by; party in fault liable for entire damage. *Lapline v. Morgan's etc. Co.*, (La.) 348.
- Interest not to be added to awarded damages for. *Western & A. R. Co. v. Young*, (Ga.) 489.

DAMAGES.

- Peril and fright. 193 *n.*
 - Peril and fright attending accident; jury entitled to consider. *Stutz v. Chicago etc. R. Co.*, (Wis.) 187.
 - Pleading. Instruction. 136 *n.*
 - Sick person; when duty of care is violated as to, measure of damages is the injury done. *Lapline v. Morgan's etc. Co.*, (La.) 348.
 - Statute fixing maximum amount recoverable; acceptance by company incorporated before its enactment. Power to repeal. *Pennsylvania R. Co. v. Bowers*, (Pa.) 353.
- DEATH. See PASSENGERS.
- Claims for damages. Vested rights. 356 *n.*
 - Damages. Prospective losses; jury may include and are not limited to losses actually sustained at precise period of death. *Searle v. Kanawha etc. R. Co.*, (W. Va.) 179.
 - Where father is killed jury may consider nurture and training his children would have received. *Searle v. Kanawha etc. R. Co.*, (W. Va.) 179.
 - Evidence. Coroner's verdict that deceased was accidentally run over; inadmissible in action for death. *Memphis & C. R. Co. v. Womack*, (Ala.) 308.
 - Declaration of trainman that they had run over and killed man held not admissible. *Memphis & C. R. Co. v. Womack*, (Ala.) 308.
 - Missouri statute as to injuries causing death. Construction of. 359 *n.*
 - Negligence causing death. Statutory liability. 347 *n.*
 - Parent and child. Child more than twenty-one years old entitled to recover for death of parent. *Galveston etc. R. Co. v. Kutac*, (Tex.) 470.
 - Children may maintain action under statute although their father had brought suit unsuccessfully. *Galveston etc. R. Co. v. Kutac*, (Tex.) 470.
 - Pleading. Amendment. Refusal to allow withdrawal of admission

DEATH.

that death directly resulted from accident upheld. *Iltis v. Chicago etc. R. Co.*, (Minn.) 299.

— Declaration not demurrable because it names widow and children and avers that damages claimed accrue to them. *Searle v. Kanawha etc. R. Co.*, (W. Va.) 179.

DISCRIMINATION. See EXPRESS COMPANIES.

EMINENT DOMAIN.

Claims for damages. Vested rights. 356 *n*.

Delegation of power. Effort to agree. 446 *n*.

Effort to agree; objection that company failed to make; no presumption of waiver by land owner. *Lake Shore etc. R. Co. v. Cincinnati etc. R. Co.*, (Ind.) 430.

Flooding. Estoppel; proceedings for condemnation will operate as, in action for flooding land. *Emery v. Raleigh & G. R. Co.*, (N. Car.) 253.

Railroad crossing. Effort by companies to agree must be alleged in petition. *Lake Shore etc. R. Co. v. Cincinnati etc. R. Co.*, (Ind.) 430.

— Effort to agree as to point or manner of crossing; what is not an averment as to. *Lake Shore etc. R. Co. v. Cincinnati etc. R. Co.*, (Ind.) 430.

Surface water. Right to cut ditches and discharge surface water into land owner's ditches. Overflow, *damnum absque injuria*. *Bell v. Norfolk & S. R. Co.*, (N. Car.) 270.

ELEVATED RAILROAD. See PASSENGERS.

EQUITY. See RECEIVER.

Irreparable damage. There can be no damage irreparable or otherwise where there is no violation of a right. *Delaware etc. R. Co. v. Central etc. Co.*, (N. J.) 607.

— When interference of court of equity is justified on ground of. *Delaware etc. R. Co. v. Central etc. Co.*, (N. J.) 607.

Legislative power; chancery courts are not any more than any other

EQUITY.

courts clothed with. *Delaware etc. R. Co. v. Central etc. Co.*, (N. J.) 607.

Specific performance; courts of chancery may enforce but cannot create obligation. *Delaware etc. R. Co. v. Central etc. Co.*, (N. J.) 607.

Vice chancellor cannot entertain jurisdiction except when referred to him by order. *Delaware etc. R. Co. v. Markley*, (N. J.) 421.

Vice chancellor; case heard by, without objection. When too late to raise question as to his right to hear case. *Delaware etc. R. Co. v. Markley*, (N. J.) 421.

Violation of legal right to complainant's irreparable injury. What must be shown. *Delaware etc. R. Co. v. Central etc. Co.*, (N. J.) 607.

ESTOPPEL.

Flooding. Proceedings for condemnation will not operate as estoppel in an action for flooding land. *Emery v. Raleigh & G. Co.*, (N. Car.) 253.

Limitation of carrier's liability. 645 *n*.

EVIDENCE.

Assault. Evidence of remark made by conductor that he "had done" plaintiff up with his punch. *Dillingham v. Anthony*, (Tex.) 1.

Coroner's verdict that deceased was accidentally run over inadmissible in action for death. *Memphis & C. R. Co. v. Womack*, (Ala.) 308.

Declarations of president of street railway company as to ownership of lines formerly operated by the company. Admissibility. *Ricketts v. Birmingham St. R. Co.*, (Ala.) 12.

— of ticket agent made some days after sale of ticket. Admissibility. *St. Louis etc. R. Co. v. Mackie*, (Tex.) 94.

— of trainman that they had run over and killed man, held not admissible. *Memphis & C. R. Co. v. Womack*, (Ala.) 308.

— Statements made by parties standing around camp fire an

EVIDENCE.

- hour or two after collision. *Missouri Pac. R. Co. v. Ivey*, (Tex.) 46.
- Derailment of train. *Res gestæ*. 136 n.
- Expert; testimony of, that culvert was the largest he had ever constructed. Evidence that another road had built larger culvert. *Emery v. Raleigh & G. R. Co.*, (N. Car.) 253.
- Former trial. Reading from opinion of appellate court on first trial statement to support which no evidence was adduced. *Wallace v. Western N. Car. R. Co.*, (N. Car.) 159.
- Injuries to child. Mother as a witness in suit by father of minor child for latter's separate use and benefit. *Lapleigne v. Morgan's etc. Co.*, (La.) 348.
- Obstructing highway with cars. Witness in defendant's employ cannot be asked if he gave his opinion that the company was careless. *Close v. Lake Shore etc. R. Co.*, (Mich.) 522.
- Officer. Action for services in obtaining loan for an investment company. Evidence that it was real owner of railroad inadmissible. *Ten Eyck v. Pontiac etc. R. Co.*, (Mich.) 273.
- Parol evidence; director's proceedings shown by, where no record is kept. *Ten Eyck v. Pontiac etc. R. Co.*, (Mich.) 273.
- Telegram not reduced to writing by sender. Parol testimony. *Terre Haute etc. R. Co. v. Stockwell*, (Ind.) 278.
- Personal injuries. Condition of family. 186 n.
- Effects of accident. Plaintiff may show that injury rendered her unable to perform her work. *Stutz v. Chicago etc. R. Co.*, (Wis.) 187.
- Examination of plaintiff's person. Physician named by defendant. *Missouri Pac. R. Co. v. Johnson*, (Tex.) 128.
- Expert witness may give opinion as to nature and extent of. *Louisville etc. R. Co. v. Snider*, (Ind.) 137.
- Reputation of engineer constructing culvert on trial of issue as to

EVIDENCE.

- whether culvert was sufficient. *Emery v. Raleigh etc. R. Co.*, (N. Car.) 253.
- Reward offered by superintendent. Admissibility of evidence to show that the offer was that of company. *Central R. & B. Co. v. Cheatham*, (Ala.) 282.
- Evidence as to circulars being posted admissible to show that company was cognizant. *Central R. & B. Co. v. Cheatham*, (Ala.) 282.
- Signal. Positive testimony entitled to more weight than negative evidence of witness who said he did not hear it. *Sibley v. Ratliff*, (Ark.) 295.
- Similar accidents resulting from cars obstructing crossing; evidence of admissible. *Pittsburgh etc. R. Co. v. Kitley*, (Ind.) 511.
- Transfer of street railway company and its franchise. How proved. *Ricketts v. Birmingham St. R. Co.*, (Ala.) 12.
- Trespasser on track. Fireman may testify whether child had time to get off after signal was given. *Kansas Pac. R. Co. v. Whipple*, (Kan.) 320.
- View by jury of crossing obstructed by cars. Proof by officer in charge that cars were not in same situation. *Close v. Lake Shore etc. R. Co.*, (Mich.) 522.
- EXPRESS COMPANY.
- Discrimination. Evasion of statute requiring railroads to extend facilities to all express companies. *International Ex. Co. v. Grand Trunk R. Co.*, (Me.) 622.
- Statute requiring railroads to extend facilities protects foreign express companies. *International Ex. Co. v. Grand Trunk R. Co.*, (Me.) 622.
- Rates. Discrimination. Other considerations. 624 n.
- FENCES. See CROSSINGS.
- Frightening horses. Injury owing to failure to fence. 489 n.
- FIRE. See BAGGAGE; CARRIERS; WAREHOUSEMAN.
- FLAGMAN. See CROSSINGS.
- FRANCHISE.
- Transfer. Legislative consent to

FRANCHISE.

- transfer and release from obligations necessary to relieve company from liability. *Chollette v. Omaha etc. R. Co.*, (Neb.) 16.
- Transfer of a street railway company and its franchises. How proved. *Ricketts v. Birmingham St. R. Co.*, (Ala.) 12.
- Transfer of property and franchises by street railway company unauthorized without authority of legislature. *Ricketts v. Birmingham St. R. Co.*, (Ala.) 12.
- Transfer. Unauthorized transfer does not relieve company from liability. *Chollette v. Omaha etc. R. Co.*, (Neb.) 16.

FRIGHTENING HORSES. See CROSSINGS; SIGNALS.

FROGS. See CROSSINGS.

GRANT. See CONVEYANCE.

GROSS RECEIPTS. See TAXATION.

HUSBAND AND WIFE. See CHILDREN.

Imputed negligence. Negligence of husband driving vehicle not imputed to wife. *Hoag v. New York etc. R. Co.*, (N. Y.) 479.

IMPUTED NEGLIGENCE. See PASSENGERS.

INDICTMENT. See INTERSTATE COMMERCE.

INFANTS. See CHILDREN.

INJUNCTION.

Corporation seeking redress against another corporation failing to perform duty. What must be shown. *Delaware etc. R. Co. v. Central etc. Co.*, (N. J.) 607.

Official discretion. Courts will not interfere with action of officer by injunction. *McWhorter v. Pensacola & A. R. Co.*, (Fla.) 566.

Rates; bill to enjoin commissioners from promulgating; when a suit against the State. *McWhorter v. Pensacola & A. R. Co.*, (Fla.) 566.

INSURANCE. See CARRIERS.

INTEREST. See DAMAGES; TAXATION.

INTERSTATE COMMERCE. See TAXATION.

Interstate commerce act. Indictment. 625 n.

INTERSTATE COMMERCE.

State commissioners cannot fix rates between two points in State over road extending across neighboring State. *State v. Chicago etc. R. Co.*, (Minn.) 602.

— cannot prescribe rates for carriers in another State. *State v. Chicago etc. R. Co.*, (Minn.) 602.

What is. Coal destined for point outside State temporarily detained within State. *Delaware etc. Canal Co. v. Com.*, (Pa.) 359.

JUDICIAL NOTICE. See ORDINANCE.

JURISDICTION. See EQUITY.

Continuous line of road running from Georgia to North Carolina and through South Carolina; jurisdiction of Georgia court though cause of action did not originate in that State. *Hills v. Richmond & D. R. Co.*, (C. C.) 44.

LEASE.

Alteration of crossing. Leased road is road of lessee within meaning of statute. *Westbrook v. New York etc. R. Co.*, (Conn.) 446.

Service of process under Georgia statute sufficiently made at place alleged to have been principal office of lessee and lessor. *Hills v. Richmond & D. R. Co.*, (C. C.) 44.

Unauthorized lease. Liability of lessor. 16 n.

LICENSE. See TAXATION; TRASSPASSERS.

Implied license to go on track. 312 n.

LIMITATIONS, STATUTE OF.

Amended complaint filed after statutory period; statute held not available. *Chicago etc. R. Co. v. Bills*, (Ind.) 121.

Amendment of complaint. 125 n.

Personal injuries. Action by husband to recover for loss of wife's services. *Maxson v. Delaware etc. R. Co.*, (N. Y.) 162.

LIVE STOCK. See PASSENGERS.

MANDAMUS.

Municipal aid. Taxation. 405 n

MASTER AND SERVANT. See **AGENT.**

Assault. See **PASSENGERS.**

Defective switches. Unblocked frogs. Injuries to employes. 347 *n.*

Punitive damages. Malicious act of servant not connected with his duties. Ratification. *Dillingham v. Anthony, (Tex.) 1.*

MINOR. See **CHILDREN.**

MONOPOLY. See **CONTRACTS.**

MUNICIPAL SUBSCRIPTION. See **TAXATION.**

NEGLIGENCE. See **CONTRIBUTORY NEGLIGENCE; CHILDREN; MASTER AND SERVANT; PASSENGERS; TRESPASSERS.**

Imputed negligence. See **PASSENGERS.**

— Negligence of driver of wagon not imputed to gratuitous passenger. *Galveston etc. R. Co. v. Kutac, (Tex.) 470.*

— Negligence of husband driving vehicle not imputed to wife riding with him. *Hoag v. New York etc. R. Co., (N. Y.) 479.*

New invention; railroad not required to discard reasonably safe appliances in order to introduce. *Gulf etc. R. Co. v. Walker, (Tex.) 342.*

NUISANCE.

Heap of refuse on land adjoining highway likely to frighten horses held a nuisance. *Brown v. Eastern etc. R. Co., (Eng.) 558.*

OFFICERS.

Action for services in obtaining loan for an investment company. Evidence that it was real owner of railroad inadmissible. *Ten Eyck v. Pontiac etc. R. Co., (Mich.) 273.*

Attorney; employment of. 278 *n.*
Declarations of president of street railway company as to ownership of lines formerly operated by company. *Ricketts v. Birmingham St. R. Co., (Ala.) 12.*

Directors. Compensation for extra services. 277 *n.*

— Proceedings shown by parol testimony where no record is kept. *Ten Eyck v. Pontiac etc. R. Co., (Mich.) 273.*

OFFICERS.

— Services as attorney and other services not embraced in duties of director; implied agreement to pay for. *Ten Eyck v. Pontiac etc. R. Co., (Mich.) 273.*
Superintendent has authority to offer reward for detection of persons obstructing track. *Central R. & B. Co. v. Cheatham, (Ala.) 282.*

ORDINANCE.

See **CROSSINGS; SIGNALS; TAXATION.**

Judicial notice. Existence of ordinance is matter for jury; court cannot notice it judicially. *Western & A. R. Co. v. Young, (Ga.) 489.*

Unreasonable ordinance cannot be valid. *Western & A. R. Co. v. Young, (Ga.) 489.*

Validity of municipal ordinances. 494 *n.*

PARENT AND CHILD. See **CHILDREN.**

Death of parent; child entitled to recover for although more than twenty-one years old. *Galveston etc. R. Co. v. Kutac, (Tex.) 470.*

— Children may maintain action under statute although their father had brought suit unsuccessfully. *Galveston etc. R. Co. v. Kutac, (Tex.) 470.*

PASSENGERS. See **BAGGAGE; TICKETS.****Generally.**

Alighting. Assistance to passengers alighting on small box; duty of company to render. *Missouri Pac. R. Co. v. Wortham, (Tex.) 82.*

— and boarding stationary train. 86 *n.*

— Duty of company to furnish passenger safe appliances for. Duty not fulfilled by furnishing small box. *Missouri Pac. R. Co. v. Wortham, (Tex.) 82.*

— Reasonable time. 85 *n.*

— Stepping stool; instruction as to negligence of company in furnishing and using, considered. *Missouri Pac. R. Co. v. Wortham, (Tex.) 82.*

Approaches to car. Company only bound to use ordinary care to

PASSENGERS.

Generally—*Continued.*

- prevent accident. *Kelley v. Manhattan R. Co.*, (N. Y.) 60.
- Arrest of disorderly persons. Statutory authority. 116 *n.*
- Assault. Evidence of remark made by conductor that he "had done" plaintiff up with his punch. *Dillingham v. Anthony*, (Tex.) 1.
- Liability of company for malicious assault by conductor on passenger. *Dillingham v. Anthony*, (Tex.) 1.
- Punitive damages for malicious assault on passenger by conductor. Ratification by company. *Dillingham v. Anthony*, (Tex.) 1.
- Bridges. Inspection. Duty of company to test material and to inspect bridges from time to time. *Louisville etc. R. Co. v. Snider*, (Ind.) 137.
- Carrying beyond destination. Natural consequences of injury. burden of proof. 186 *n.*
- Carrying past station. Duty of company to back train down to platform and not to compel passenger to alight and walk back. *New York etc. R. Co. v. Doane*, (Ind.) 87.
- Collision. Evidence. Statements made by parties standing around camp fire an hour or two after collision. *Missouri Pac. R. Co. v. Ivey*, (Tex.) 46.
- Imputed negligence. Negligence of carrier not imputable to passenger. *New York etc. R. Co. v. Cooper*, (Va.) 33.
- Negligence of carrier not imputed to passenger. 44 *n.*
- Steamboat's tug attempting to cross ferryboat's bow; negligence shown. *New York etc. R. Co. v. Cooper*, (Va.) 33.
- Connecting lines. Company carrying passenger through to point on connecting road without change liable for negligence at destination. *Chollette v. Omaha etc. R. Co.*, (Neb.) 16.
- Contracting company held liable for injury by negligence of. *Washington v. Raleigh & G. R. Co.*, (N. Car.) 25.
- Liability in the carriage of passengers. 32.

PASSENGERS.

Generally—*Continued.*

- Declarations. Pleading. Averment that decedent was killed by overthrowing of car, held not demurrable. *Searle v. Kanawha etc. R. Co.*, (W. Va.) 179.
- Defective switches. Unblocked frogs. 347 *n.*
- Defective track. Company held to utmost care in care of track and bridges. *Searle v. Kanawha etc. R. Co.*, (W. Va.) 179.
- Condition of track. Unprecedented weather. 135 *n.*
- Exemplary damages for injuries caused by. Instructions considered. *Missouri Pac. R. Co. v. Shuford*, (Tex.) 194.
- Negligence in maintaining. 135 *n.*
- Under statute company liable if before accident road would have indicated that it was unsafe. *Littlejohn v. Fitchburg R. Co.*, (Mass.) 54.
- When company can avail itself of defense of unprecedented bad weather. *Missouri Pac. R. Co. v. Johnson*, (Tex.) 128.
- Degree of care. Collision. Refusal to instruct as to degree of care required where question was as to contributory negligence. *New York etc. R. Co. v. Cooper*, (Va.) 33.
- Greatest possible care and diligence required. *Searle v. Kanawha etc. R. Co.*, (W. Va.) 179.
- Omission of carrier to exercise highest degree of care constitutes negligence. *Louisville etc. R. Co. v. Snider*, (Ind.) 137.
- Slightest neglect renders company liable in damages for causing death. *Searle v. Kanawha etc. R. Co.*, (W. Va.) 179.
- Derailment of train. Negligence. Province of jury. 135 *n.*
- Weight of evidence. 136 *n.*
- Diseased person; injury to. Liability of carrier. 140 *n.*
- Elevated railroad. Snow on step. Passenger slightly intoxicated fell and was killed. Negligence not shown. *Kelley v. Manhattan R. Co.*, (N. Y.) 60.
- Exemplary damages recovered

PASSENGERS.

Generally—Continued.

when negligence of servants is malicious, oppressive or reckless. *Quinn v. S. Car. R. Co.*, (S. Car.) 166.

— Recovery of for torts of servants. 171 *n*.

Free Pass. See **TICKETS**.

Freight train. Discharging passengers. Duty of company to bring train to platform or other convenient place. *New York etc. R. Co. v. Doane*, (Ind.) 87.

— Expulsion of passenger violating rule by riding on freight train without permit. Pleading. Variance. *Thomas v. Chicago etc. R. Co.*, (Mich.) 108.

— Permit. Rule forbidding passengers on freight trains without written order of superintendent is reasonable. *Thomas v. Chicago etc. R. Co.*, (Mich.) 108.

— Sudden jerk causing passenger to fall to floor. Instruction as to overloading or negligent management. *Wallace v. Western N. Car. R. Co.*, (N. Car.) 159.

Intoxicated person entering train without right and without knowledge of conductor. Duty of company. *Missouri Pac. R. Co. v. Evans*, (Tex.) 144.

Jumping from train through fright. 193 *n*.

Leased line which lessor undertook to keep in repair; accident occurring on. Recovery against lessee. *Littlejohn v. Fitchburg R. Co.*, (Mass.) 54.

Limitation of action. Statute held not available notwithstanding amended complaint was filed after statutory period. *Chicago etc. R. Co. v. Bills*, (Ind.) 121.

Limiting liability for injuries resulting from carrier's own negligence or negligence of its servants, unauthorized. *Missouri Pac. R. Co. v. Ivey*, (Tex.) 46.

Mistake of ticket agent requiring passenger to move from first to second class car. *St. Louis etc. R. Co. v. Mackie*, (Tex.) 94.

"Negligence." Instruction that negligence means failure to do what a prudent person would

PASSENGERS.

Generally—Continued.

have done properly refused. *Louisville etc. R. Co. v. Snider*, (Ind.) 137.

Passing train; passenger struck by hard substance from; province of jury. *Pennsylvania R. Co. v. MacKinney*, (Pa.) 153.

Person accompanying live stock. Contributory negligence. 53 *n*.

— Drover's pass. Liability of company. 53 *n*.

— right of. 53 *n*.

— is passenger for hire. Agreement with company held not to change relation. *Missouri Pac. R. Co. v. Ivey*, (Tex.) 46.

Personal injuries. Derailment of train. *Res gestæ*. 136 *n*.

Presumption of negligence arising from evidence of occurrence of accident; burden of overcoming is on carrier. *Louisville etc. R. Co. v. Snider*, (Ind.) 137.

— Passenger injured by being struck by a hard substance while sitting by window. No presumption of negligence. *Pennsylvania R. Co. v. MacKinney*, (Pa.) 153.

Regulation. Rule prohibiting passengers from wearing uniform cap of line of steamers running in opposition to line connecting with railroad is unreasonable. *South Fla. R. Co. v. Rhoads*, (Fla.) 100.

— Sufficiency of notice. 108 *n*.

Second class instead of first class ticket; issue to passenger. Failure to pay difference in fare while on train does not affect his right of action. *St. Louis etc. R. Co. v. Mackie*, (Tex.) 94.

Second class; passenger and his wife compelled to travel through mistake of agent. Damages for injuries to wife. *St. Louis etc. R. Co. v. Mackie*, (Tex.) 94.

Snow and ice on car platform; duty of company to remove. *Palmer v. Pennsylvania R. Co.*, (N. Y.) 150.

Station accommodations. Safety and sufficiency. 66 *n*.

— Crossing track to reach platform; party struck by engine, held guilty of contributory negligence. *Casey v. Canadian Pac. R. Co.*, (Ont.) 172.

PASSENGERS.

Generally—*Continued.*

— Landing at wharf. Passenger injured while going ashore to get breakfast. *Dodge v. Boston etc. S. Co., (Mass.)* 67.

Statutory liability. Company liable though persons killed were children carried free. *Littlejohn v. Fitchburg R. Co., (Mass.)* 54.

— There must be some degree of culpability on the part of the corporation or its servants. *Littlejohn v. Fitchburg R. Co., (Mass.)* 54.

Steamboat landing. Degree of care to be exercised by company to passengers attempting to land. *Dodge v. Boston etc. S. Co., (Mass.)* 67.

Sudden starting of street car. Instruction held to state too broadly degree of care required. *Dougherty v. Missouri Pac. R. Co., (Mo.)* 206.

Tickets. See that title.

Transfer of property and franchises of street railway company; liability to passengers not affected by. *Ricketts v. Birmingham St. R. Co., (Ala.)* 12.

Who is. Boarding train at place not depot with permission of company. *Dewire v. Boston & M. R. Co., (Mass.)* 57.

Contributory Negligence.

Absence of employees. 94 *n.*

Alighting from freight train beyond destination. Walking back and falling into cattle guard. *New York etc. R. Co. v. Doane, (Ind.)* 87.

Alighting from moving train. 93 *n.*

Alighting from street car while in motion carrying 50lb. keg of lead is. *Ricketts v. Birmingham St. R. Co., (Ala.)* 12.

Alighting from train. Nonsuit. 85 *n.*

— Province of jury. 86 *n.*

Arm projecting from car window; injury to passenger riding with. 172 *n.*

— Question of contributory negligence is for jury, and not for court. *Quinn v. S. Car. R. Co., (S. Car.)* 166.

Assuming dangerous position

PASSENGERS.

Contributory Negligence—*Cont.*

while doing dangerous act at bidding of conductor. 81 *n.*

Boarding horse car moving at rate of four miles an hour without giving signal to driver. *Briggs v. Union St. R. Co., (Mass.)* 204.

Boarding moving street car. 206 *n.*

Boarding moving street car and seizing dasher after losing hold upon rail attached to car. *Briggs v. Union St. R. Co., (Mass.)* 204.

Boarding moving street car at rear platform. Question for jury. *Briggs v. Union St. R. Co., (Mass.)* 204.

Boarding moving train. 81 *n.*

— at direction of conductor at station where it was advertised to stop. *Hunter v. Cooperstown etc. R. Co., (N. Y.)* 74.

— Crossing tracks. 81 *n.*

— Direction of conductor. 81 *n.*

— Statement of conductor. 81 *n.*

Entering car. Absence of stepping stool. 86 *n.*

Falling of bridge. Passenger not negligent when he was in proper place and did not expose himself. *Louisville etc. R. Co. v. Snider, (Ind.)* 137.

Freight train. Passenger failing to leave while it is stopped several hundred feet from platform in dangerous locality. *New York etc. R. Co. v. Doane, (Ind.)* 87.

Intoxication no excuse for failure of traveler to exercise duty of self-preservation. *Missouri Pac. R. Co. v. Evans, (Tex.)* 144.

Liability notwithstanding. Instruction open to objection that it allowed recovery regardless of plaintiff's negligence. *Dougherty v. Missouri Pac. R. Co., (Mo.)* 206.

Moving car; getting on or off either platform of street car; contributory negligence is for jury. *Briggs v. Union St. R. Co., (Mass.)* 204.

Passing through train to find seat; passenger does not take risk of collision. *Dewire v. Boston & M. R. Co., (Mass.)* 57.

PASSENGERS.

Contributory Negligence—Cont.

- Pleading. 171 *n*.
- Presumption of. 81 *n*.
- Province of jury. 179 *n*.
- Regulations; disregard of, by passenger in attempting to land from steamboat. *Dodge v. Boston etc. S. Co.*, (Mass.) 67.
- Riding on foot board of street car. Province of jury. 206 *n*.
- Snow and ice on platform; passenger injured by slipping on with knowledge of defect. *Palmer v. Pennsylvania R. Co.*, (N. Y.) 150.
- Street car platform; whether person riding on was negligent is question for jury. *Briggs v. Union St. R. Co.*, (Mass.) 204.
- Travelling on platform. 60 *n*.

Expulsion.

See **TICKETS**.

Abandonment on street of passenger stricken with apoplexy while riding in car. *Conolly v. Crescent City R. Co.*, (La.) 117.

Contributory negligence. 125 *n*.

Degree of care exercised immaterial when company rests upon denial of any care in the premises. *Conolly v. Crescent City R. Co.*, (La.) 117.

Delirious passenger. 121 *n*.

Disorderly conduct. Passenger has no right to remain on train when disorderly or using vulgar language. *Peavy v. Georgia R. Co.*, (Ga.) 114.

Disorderly passengers. 116 *n*.

Drunkenness. Mistake of street car driver in supposing passenger was drunk when he was merely ill. *Conolly v. Crescent City R. Co.*, (La.) 117.

Exemplary damages. 126 *n*, 108 *n*.

Explanation by passenger. Offer. Pleading. 126 *n*.

Infectious disease; removal of passenger suffering from. 121 *n*.

Intoxicated passengers, expulsion of. 117 *n*.

Liability of company. 125 *n*.

Measure of damages. 125 *n*, 186 *n*.

Place for expelling passenger violating rule. *South Fla. R. Co. v. Rhoads*, (Fla.) 100.

— Statute forbidding expulsion except at "passenger sta-

PASSENGERS.

Expulsion—Continued.

tion" or place where tickets are ordinarily sold. *Baldwin v. Grand Trunk R. Co.*, (N. H.) 126.

— Unusual stopping place. 128 *n*.

— Where expulsion may take place. 128 *n*.

Pleading. Necessity for allegation that passenger was complying with rule. *South Fla. R. Co. v. Rhoads*, (Fla.) 100.

Sale of non-transferable ticket. 125 *n*.

Shooting by conductor of disorderly passenger whom he has expelled. *Peavy v. Georgia R. Co.*, (Ga.) 114.

Sick person; right to expel cannot be exercised without due regard for his safety. *Conolly v. Crescent City R. Co.*, (La.) 117.

Unnecessary force. 126 *n*.

— Fact that passenger was wrongfully on train no defense. Contributory negligence immaterial. *Chicago etc. R. Co. v. Bills*, (Ind.) 121.

— Plaintiff's negligence in entering wrong train immaterial. *Chicago etc. R. Co. v. Bills*, (Ind.) 121.

PENALTY.

Crossing. \$5,000, recoverable under statute for death caused by failure to ring bell at crossing. *Crumpley v. Hannibal etc. R. Co.*, (Mo.) 357.

— Statute providing for penalty in case of death of passenger not applicable to person killed at. *Crumpley v. Hannibal etc. R. Co.*, (Mo.) 357.

Frightening horses. Action for penalty. 489 *n*.

Injuries causing death. Construction of Missouri statute. 359 *n*. Suit against State; bill to enjoin railroad commissioners from instituting suit to recover penalty held to constitute. *McWhorter v. Pensacola & A. R. Co.*, (Fla.) 566.

PERSONAL INJURIES. See **CHILDREN**; **DAMAGES**; **EVIDENCE**; **PASSENGERS**; **STREETS AND HIGHWAYS**; **TRESPASSERS**.

PHYSICIAN. See **AGENTS.****PLEADING AND PRACTICE.**

Amendment. Discretion of court in refusing to allow withdrawal of admission that death resulted directly from accident. *Iltis v. Chicago etc. R. Co.*, (Minn.) 299.

Argument of counsel. Improper language influencing jury; judgment reversed on account of. *Galveston etc. R. Co. v. Kutac*, (Tex.) 470.

View by jury. See **EVIDENCE.**

PROXIMATE CAUSE.

Co-operating causes. Proximate cause is originating and efficient cause which sets other cause in motion. *Lapline v. Morgan's etc. Co.*, (La.) 348.

RAILROAD COMMISSIONERS.

Authority and jurisdiction of State railroad commissioners. 607 *n.*

Discretion of commissioners in fixing rates. Whether rates are remunerative. Court cannot interfere. *Pensacola & A. R. Co. v. State*, (Fla.) 579.

Enforcement of tariff that will not pay operating expenses is abuse of discretion and a taking of property without compensation. *Pensacola & A. R. Co. v. State*, (Fla.) 579.

Establishment of freight charges. Appeal. 607 *n.*

Interstate commerce. State commissioner cannot fix rates between two points in State over road extending across neighboring State. *State v. Chicago etc. R. Co.*, (Minn.) 602.

— State commissioners cannot prescribe rates for carriers in another State. *State v. Chicago etc. R. Co.*, (Minn.) 602.

Rates. Constitutional law. Statute conferring on commissioners power to make rates not a delegation of legislative power. *McWhorter v. Pensacola & A. R. Co.*, (Fla.) 566.

— Courts have no power to make tariffs. *Pensacola & A. R. Co. v. State*, (Fla.) 579.

— Courts will not interfere when rates fixed are not assailed as an entirety. *Pensacola & A. R. Co. v. State*, (Fla.) 579.

RAILROAD COMMISSIONERS.

— Discretion. Courts will not interfere by injunction with commissioner's discretion in making rates. *McWhorter v. Pensacola & A. R. Co.*, (Fla.) 566.

— Reasonableness of, made by commissioners, not open to inquiry in suit to enjoin discretionary action. *McWhorter v. Pensacola & A. R. Co.*, (Fla.) 566.

— Reasonableness; effect of provision that schedule fixed by commissioners shall be deemed evidence of. *Pensacola & A. R. Co. v. State*, (Fla.) 579.

Suit against commissioners. 600 *n.*

Suit against State; bill to enjoin commissioners from instituting suit to recover penalty held to constitute. *McWhorter v. Pensacola & A. R. Co.*, (Fla.) 566.

— bill to enjoin commissioners from promulgating rates held not to constitute. *McWhorter v. Pensacola & A. R. Co.*, (Fla.) 566.

— When rule forbidding suit against officers of State applies. *McWhorter v. Pensacola & A. R. Co.*, (Fla.) 566.

RECEIVER.

Appointment. Failure to run trains; exception that act shall not appoint to short road at seaside resort. *Delaware etc. R. Co. v. Markley*, (N. J.) 421.

— Power conferred on court of chancery and not upon chancellor in personal capacity. *Delaware etc. R. Co. v. Markley*, (N. J.) 421.

— Reference. Chancellor can refer appointment of receiver to vice chancellor and to master. *Delaware etc. R. Co. v. Markley*, (N. J.) 421.

— Special legislation; act accepting roads at seaside resorts is not. *Delaware etc. R. Co. v. Markley*, (N. J.) 421.

Bond of indemnity given on resuming control of road to pay debts and liabilities of receiver. Liabilities under. *Godfrey v. Ohio & M. R. Co.*, (Ind.) 8.

Leave to sue receiver. 8 *n.*

Leave to sue. Under U. S. Act,

RECEIVER.

- March 3, 1887, receivers are subject to suit without leave. *Dillingham v. Anthony*. (Tex.) 1.
 Liability of company for receiver's acts. 12 n.
 Liability of company on resuming control for mistake of ticket agent in employ of receiver. *Godfrey v. Ohio & M. R. Co.*, (Ind.) 8.

REMOVAL OF CAUSE.

- Civil action for penalty imposed by statute upon railroad companies for extortion is, notwithstanding its form, criminal in its nature and is not removable to federal courts. *State v. Chicago etc. R. Co.*, (C. C.) 721.

REWARD. See EVIDENCE; ULTRA VIRES.

- Past and future offenses; offer of reward for detection of person obstructing track, held to apply to. *Central R. & B. Co. v. Cheatham*, (Ala.) 282.
 When reward is earned. 287 n.

RULES AND REGULATIONS. See PASSENGERS.

- Baggage. Regulation of company having five stations in city to check baggage only to terminal station, unreasonable. *Pittsburgh etc. R. Co. v. Lyon*, (Pa.) 231.
 Carriers. Termination of transit. Regulation fixing period when company is only liable as warehouseman, held valid. *Western R. Co. v. Little*, (Ala.) 659.
 Notice; sufficiency of. 108 n.
 Passengers. Uniform. Rule prohibiting passengers from wearing uniform cap of line of steamers running in opposition to line connecting with railroad is unreasonable. *South Fla. R. Co. v. Rhoads*, (Fla.) 100.
 Reasonableness of rule is purely a question of law, and is not to be passed upon by juries. *South Fla. R. Co. v. Rhoads*, (Fla.) 100.
 Rules and regulations of railroad companies. 234 n.

SERVICE OF PROCESS.

- Lease. Service under Georgia statute sufficiently made at place alleged to have been principal office of lessee and lessor. *Hills*

SERVICE OF PROCESS

- v. Richmond & D. R. Co.*, (C. C.) 44.

SIGNALS. See CROSSINGS.

- Distance from crossing. Statute requiring signal within 80 rods. Under circumstances held not negligent to give within 45 rods. *Bailey v. Hartford etc. R. Co.*, (Conn.) 483.
 Frightening horses by whistle sounded at crossing. Liability of company. *Bailey v. Hartford etc. R. Co.*, (Conn.) 483.
 Negligent act of flagman. 489 n.

Statutory signals. 488 n.

- Omission to give signal does not impose liability when it in no way contributes to accident. *Shoebrink v. Canada A. R. Co.*, (Ont.) 462.

- Penalty. \$5,000 recoverable under statute for death caused by failure to ring bell at crossing. *Crumpley v. Hannibal etc. R. Co.*, (Mo.) 357.

- Positive testimony that signal was given entitled to more weight than negative evidence. *Sibley v. Ratliffe*, (Ark.) 295.

- Statutory signals; who entitled to benefit of. 470 n.

- Trespassers; statutory requirements as to signals and speed not applicable to. Failure to comply as evidence of negligence. *Central R. Co. v. Raiford*, (Ga.) 481.

SPECIFIC PERFORMANCE. See EQUITY.**SPEED.** See CROSSINGS.

- Evidence offered in rebuttal to testimony of defendant's witnesses that speed was the same as it had been for ten days. *Close v. Lake Shore etc. R. Co.*, (Mich.) 522.

- Validity of municipal ordinances. 494 n.

STATE. See RAILROAD COMMISSIONERS.

- Suit against State. When rule forbidding suit against officers of State applies. *McWhorter v. Pensacola & A. R. Co.*, (Fla.) 566.

STATIONS. See **PASSENGERS.**

Boy playing in switch yard was injured; *held* that the company was not bound to anticipate his presence and was not liable. *Williams v. Kansas City etc. R. Co.*, (Mo.) 329.

Brick yard employe pushing car and run over by other cars not guilty of contributory negligence. *Iltis v. Chicago etc. R. Co.*, (Minn.) 299.

Moving cars down spur track without guarding against injuries to brick yard employe pushing car; company held liable. *Iltis v. Chicago etc. R. Co.*, (Minn.) 299.

Personal injuries in railroad company's yards. Contributory negligence. 306 *n*.

STATUTE. See **SIGNALS.**

Limitation of liability for personal injuries; acceptance by company. Power to repeal. *Pennsylvania R. Co. v. Bowers*, (Pa.) 353.

STATUTE OF LIMITATIONS. See **LIMITATIONS, STATUTE OF.**

STEAMBOAT COLLISION. See **PASSENGERS.**

STOCKYARDS. See **WAREHOUSE-MAN.**

Legislative intention as to subjecting company to duty to railroads. Charter construed. *Delaware etc. R. Co. v. Central etc. Co.*, (N. J.) 607.

Warehouseman; business of stockyard company corresponds in many respects with business of. *Delaware etc. R. Co. v. Central etc. Co.*, (N. J.) 607.

STOPPAGE IN TRANSITU. See **CARRIERS.**

STREETS AND HIGHWAYS.

Cutting rail with cold chisel. Bystander injured by piece of iron striking him on the eye, held entitled to recover. *Chicago etc. R. Co. v. Harper*, (Ill.) 549.

Personal injuries caused by catching foot in frog. Defendant not liable if track was safe and engineer not negligent. *Gulf etc. R. Co. v. Walker*, (Tex.) 342.

— Contributory negligence; traveling by side of track on which car is moving in same direction is not. *Brooks v. Lincoln St. R. Co.*, (Neb.) 560.

STREETS AND HIGHWAYS.

rection is not. *Brooks v. Lincoln St. R. Co.*, (Neb.) 560.

— Frog unblocked; person injured by. Evidence as to devices adopted by other roads admissible. *Gulf etc. R. Co. v. Walker*, (Tex.) 342.

— Instruction as to care required of company to prevent accidents. *Gulf etc. R. Co. v. Walker*, (Tex.) 342.

— sustained through catching foot in frog. Instruction as to design and purpose of streets held proper. *Gulf etc. R. Co. v. Walker*, (Tex.) 342.

— Unsafe condition of track. Care required to avoid injuring one who may possibly be a trespasser. *Gulf etc. R. Co. v. Walker*, (Tex.) 342.

Street marked on plan held not a highway within meaning of Railway Act. *Shoebrink v. Canada A. R. Co.*, (Ont.) 462.

STREET RAILWAYS.

Contributory negligence; traveling by side of track on which car is moving in same direction is not. *Brooks v. Lincoln St. R. Co.*, (Neb.) 560.

Driver of horse car; duty of to prevent collision and injury to persons travelling over the street. *Brooks v. Lincoln St. R. Co.*, (Neb.) 560.

Interchange of traffic. Contract of street railway to make connections so long as it receives fare allowed by law, construed. *Buffalo etc. R. Co. v. Buffalo St. R. Co.*, (N. Y.) 200.

License tax. Railway paying license fee extended road subject to payment of per cent. of net proceeds. Statutes construed. *Mayor etc. v. Dry Dock etc. R. Co.*, (N. Y.) 411.

Transfer of property and franchises by street railway company unauthorized without the authority of legislature. *Ricketts v. Birmingham St. R. Co.*, (Ala.) 12.

Transfer of street railway company and its franchise. How proved. *Ricketts v. Birmingham St. R. Co.*, (Ala.) 12.

SUBROGATION. See **CARRIERS.**

SURFACE WATERS. See **CULVERTS.****TAXATION.**

Assessment of railroad as a unit. 420 n.

Bridges; assessment of. 410 n.
— across river, assessable under statute providing for taxation of railroad property and not that relating to toll bridges. *State v. Hannibal etc. R. Co.*, (Mo.) 406.

— Held not to be a toll bridge but a railroad bridge assessable as part of railroad. *State v. Hannibal etc. R. Co.*, (Mo.) 406.

— Over Missouri river. 410 n.
— Question whether bridge is toll bridge is jurisdictional. Conclusion of State board reviewable. *State v. Hannibal etc. R. Co.*, (Mo.) 406.

Constitutional law. Title of act. 405 n.

Constitutional limit; tax increased beyond by vote of district; such increased limit becomes limit decreed by constitution. *Chicago etc. R. Co. v. Lamkin*, (Mo.) 413.

County taxation of railroads not authorized in Kentucky. Statutes considered. *Com. v. Louisville & N. R. Co.*, (Ky.) 418.

Exemption. Completion of road. Charter providing that property shall be exempt for twenty years from completion of road construed. *Yazoo etc. R. Co. v. Thomas*, (Miss.) 392.

— Constitutional law. 393 n.

— Construction of charter clause. 394 n., 395 n.

— Lands exempt "until sold and conveyed" if conveyed before May 1st are taxable. *Martin Co. v. Drake*, (Minn.) 389.

— Right of way; exemption does not include superstructure, i. e., railroad thereon. *Atlantic etc. R. Co. v. Lesueur*, (Ark.) 368.

— Special assessments. 400 n.

— Special tax for local improvements not within meaning of provisions in charter. *Illinois Cent. R. Co. v. Decatur*, (Ill.) 395.

— Strictest construction; exemption from taxation can be

TAXATION.

sustained only from. *Atlantic etc. R. Co. v. Lesueur*, (Ariz.) 368.

Franchise granted by congress; taxation of not unconstitutional as regulation of interstate commerce. *Atlantic etc. R. Co. v. Lesueur*, (Ariz.) 368.

— Taxation not unconstitutional as taxing federal agency. *Atlantic etc. R. Co. v. Lesueur*, (Ariz.) 368.

Gross receipts; acts imposing tax on, invalid as regulation of interstate commerce. *Northern Pac. R. Co. v. Raymond*, (Dak.) 379.

— Foreign company; receipts of, remitted to its office in another State. Right to tax not interfered with. *Delaware etc. Canal Co. v. Com.*, (Pa.) 359.

— Interstate commerce. 368 n.

— Pennsylvania act imposing tax on, held invalid as regulation of interstate commerce. *Delaware etc. Canal Co. v. Com.* (Pa.) 359.

Interest not allowable in action by county to recover unpaid taxes. *Louisville & N. R. Co. v. Hopkins Co.*, (Ky.) 400.

License and privilege taxes. 413 n.

— Ordinance requiring company chartered by congress to take out license is void. *San Benito Co. v. Southern Pac. R. Co.*, (Cal.) 374.

— Municipal ordinance. 378 n.

— Railway paying license fee extended road subject to payment of per cent. of net proceeds. Statutes construed. *Mayor v. Dry Dock etc. R. Co.*, (N. Y.) 411.

Municipal aid. *Mandamus*. 405 n.

National corporations. 374 n.

Recovery back of taxes; railroad need not submit to levy and sale of property for delinquent taxes or pay amount assessed. *Louisville & N. R. Co. v. Hopkins Co.*, (Ky.) 400.

Rolling stock. 374 n.

— *Situs* of is where it is habitually used. Amount may be fixed by average amount used. *Atlantic etc. R. Co. v. Lesueur*, (Ariz.) 368.

School buildings. Railroad tax

TAXATION.

for erection of public building. Apportionment among the school districts held not unconstitutional. *Chicago etc. R. Co. v. Lamkin, (Mo.)* 413.

School taxes. Construction of Missouri statute. 418 #.

Subscription in aid. Liability to taxation of company purchasing completed road to pay subscription made by county. *Louisville & N. R. Co. v. Hopkins Co., (Ky.)* 400.

— Sale of road. 405 #.

TELEGRAM. See EVIDENCE.

TICKETS AND FARES.

Annual pass issued to firm. Renewal. Duty of firm or of company to make application. *Knopf v. Richmond etc. R. Co., (Va.)* 140.

Constitutional law. Act reducing fares on street railways valid notwithstanding contract between two roads. *Buffalo etc. R. Co. v. Buffalo St. R. Co., (N. Y.)* 200.

Declaration of ticket agent made some days after sale of ticket. Admissibility. *St. Louis etc. R. Co. v. Mackie, (Tex.)* 94.

Detaching return coupon. 99 #.

Interchange traffic. Contract of street railway to make connections so long as it receives fare allowed by law. *Buffalo etc. R. Co. v. Buffalo St. R. Co., (N. Y.)* 200.

Limitation of liability. See BAGGAGE.

Mistake in issuing. Ratification by intending traveler keeping ticket four months without complaint. *Godfrey v. Ohio & M. R. Co., (Ind.)* 8.

— of agent in employ of receiver; liability of company on resuming control of road. *Godfrey v. Ohio & M. R. Co., (Ind.)* 8.

— Of agent in stamping ticket. 99 #.

— Of conductor. 99 #.

— Of ticket agent compelling passenger to travel second instead of first class. Right to recover damages. *St. Louis etc. R. Co. v. Mackie, (Tex.)* 94.

TICKETS AND FARES.

Partners of a firm; ticket entitling only one to ride at a time, construed. *Knopf v. Richmond etc. R. Co., (Va.)* 140.

Sale of nontransferrable ticket. 125 #.

Wrongful refusal to accept ticket. 99 #.

TRANSFER. See FRANCHISE.

TRESPASSERS. See STREETS AND HIGHWAYS; TURN TABLE.

Boarding train at place not a depot with permission of company. *Dewire v. Boston & M. R. Co., (Mass.)* 57.

Boy playing in switch yard; employes not bound to watch for and discover. *Williams v. Kansas City etc. R. Co., (Mo.)* 329.

Children trespassing on railroad track. 329 #.

Contributory negligence. Children. Instruction that plaintiff could recover although negligent if accident could have been prevented by reasonable care, held erroneous. *Williams v. Kansas City etc. R. Co., (Mo.)* 329.

— Deaf man walking on track and run over by train held guilty of. 291 #.

— Degree of care required of one using track to walk upon although at the moment at a crossing. *Central R. Co. v. Raiford, (Ga.)* 481.

— Employee in brick yard pushing cars and killed by other cars being backed down, held not guilty of. *Ilitis v. Chicago etc. R. Co., (Minn.)* 299.

— Intoxicated person. 312 #.

— Intoxicated person. Sleeping on track. 312 #.

— Intoxicated person walking on track where he could not well be seen by engineer. *Memphis & C. R. Co. v. Womack, (Ala.)* 308.

— Person going on track when he knew train was due and failing to look out for it. *Barker v. Hannibal etc. R. Co., (Mo.)* 292.

— Reckless or wanton injury not excused by fact that one has put himself in danger. *Kansas Pac. R. Co. v. Whipple, (Kan.)* 320.

TRESPASSERS.

— Sufficiency of finding. 306 #.
Deaf man walking on track run over. Company not guilty of negligence not being aware of his infirmity. *Artusy v. Missouri Pac. R. Co.*, (Tex.) 288.

Deaf person; liability for injury to. 291 #.

Duty of company. Child on track whose presence was discovered by engineer in time to prevent injury. Liability of company. *Kansas Pac. R. Co. v. Whipple*, (Kan.) 320.

— Man walking on track was killed; no recovery in absence of evidence that engineer had seen him. *Barker v. Hannibal etc. R. Co.*, (Mo.) 292.

— no duty owing to trespasser except not to wantonly injure him. *Barker v. Hannibal etc. R. Co.*, (Mo.) 292.

Evidence. Fireman may testify whether child had time to get off after signal was given. *Kansas Pac. R. Co. v. Whipple*, (Kan.) 320.

— held sufficient to sustain finding that plaintiff was 200 yards from engine when seen by engineer. *Sibley v. Ratliffe*, (Ark.) 295.

Expulsion of passenger for defect in ticket. 99 #.

Liability of company to trespassers. 294 #.

Licenses upon track. Liability of company. 319 #.

— Persons accustomed to crossing switch in railroad yard without objection. Duty and liability of company. *St. Louis etc. R. Co. v. Crosnoe*, (Tex.) 313.

License to go on track. Fact that person had been accustomed to walk on track; obligation imposed on company by. *Memphis & C. R. Co. v. Womack*, (Ala.) 308.

Public street. Person injured through unsafe condition of track. Degree of care required. Instructions considered. *Gulf etc. R. Co. v. Walker*, (Tex.) 342.

Signals and speed; statutory requirements not applicable to. Failure to comply as evidence of negligence. *Central R. Co. v. Raiford*, (Ga.) 481.

TRESPASSERS.

— Positive testimony entitled to more weight than negative; evidence of witness who said he did not hear it. *Sibley v. Ratliffe*, (Ark.) 295.

TURN TABLE.

Child playing on turn table injured by catching his foot, held guilty of contributory negligence. *Twist v. Winona etc. R. Co.*, (Minn.) 336.

Children; injuries to. 341 #.

ULTRA VIRES.

Reward; offer of for detection of persons obstructing track, not *ultra vires*. *Central R. & B. Co. v. Cheatham*, (Ala.) 282.

VIEW BY JURY. See EVIDENCE-WAREHOUSEMAN. See BAGGAGE.

Legislature has power to declare what services shall be rendered and to fix compensation. *Delaware etc. R. Co. v. Central etc. Co.*, (N. J.) 607.

Liberty of warehousemen to use their warehouses as they please in absence of legislation. *Delaware etc. R. Co. v. Central etc. Co.*, (N. J.) 607.

Possession of another man's property; warehouseman cannot have forced upon him against his will. *Delaware etc. R. Co. v. Central etc. Co.*, (N. J.) 607.

Stockyard company; business of, corresponds with business of warehouseman. *Delaware etc. R. Co. v. Central etc. Co.*, (N. J.) 607.

Termination of transit. Regulation fixing period when company is only liable as warehouseman *held valid*. *Western R. Co. v. Little*, (Ala.) 659.

WATERS AND WATER-COURSES. See BRIDGE; CULVERTS.

Flooding lands. Damages. 253 #.

— Evidence of negligence. 253 #.

Surface water. Eminent domain. Right to cut ditches and discharge surface water into land owner's ditches. Overflow *damnum absque injuria*. *Bell v. Norfolk & S. R. Co.*, (N. Car.) 270.

— obstruction of. 272 #.

YARDS. See STATIONS.

Stanford Law Library



3 6105 063 659 507

